SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 189

E. B. ENGEL, PETITIONER,

vs.

J. O. DAVENPORT ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED OCTOBER 16, 1924

CERTIORARI GRANTED DECEMBER 15 1924

(30,662)

(30,662)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 697

E. B. ENGEL, PETITIONER,

vs.

J. O. DAVENPORT ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Proceedings in supreme court of California	1	1
Caption (omitted in printing)	1	1
Record from superior court of San Francisco County	1	1
Bill of complaint	3	1
Demurrer and order thereon	6	3
Judgment	8	4
Notice of appeal	9	5
Stipulation re transcript of record	10	5
Clerk's certificate	11	5
Argument and submission	12	6
Opinion, Lennon, J.	13	6
Final judgment	23	11
Order overruling petition for rehearing and modifying opinion	24	12
Assignment of errors	24	12
Præcipe for transcript of record	26	13
Clerk's certificate	27	14
Order granting petition for certiorari	29	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1924

[fol. 1] CAPTION—Omitted

IN SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, DEPT. No. 5

No. 132,819

E. B. ENGEL, Plaintiff,

vs.

J. O. DAVENPORT, E. J. CORNWALL, MARY L. CORNWALL, B. C. EDELIN, E. G. FOY, W. BUNNELL, P. E. MACKAY, W. E. BARTON, O. E. MARSTON, J. E. WALLACE, C. J. HENDRY CO., CHAS. C. MOORE CO., [fol. 2] MARSHALL NEWELL SUPPLY CO., WALLACE BRADFORD, M. BRENDELL, R. W. CURTIN, M. L. CULL, C. E. DAHL, F. M. DE LANO, G. DELOREN, M. A. DENSTON, C. ERICKSON, S. J. EVA, O. E. ROYLEMAN, W. J. GERDAU, E. GRUGG, E. GUENTHER, L. H. HAIN, K. HARTOG, N. HODGKINS, E. C. HUNTER, J. JACOBSEN, S. JACOBSEN, M. JOHNSON, W. H. JOHNSON, E. NELSON, *E. Nelson*, E. C. NELSON, C. W. PAGE, F. D. PARR, F. J. REMURS, R. L. ROBERTS, M. ROBERTSON, L. ROJENSTEDT, WM. H. LIVINGSTON, E. C. TUNGBERG, E. H. TOMLINSON, T. L. TOMLINSON, P. VAN BREND, H. WERTOCH, E. L. WEULE, S. WAITE, H. E. WILLIAMS, C. SGMERLE, KNOWLAND COMPANY, F. L. BARRETT, J. R. CLARSBY, S. JOHNSON, S. B. WATERS, T. C. WATTS, E. BRAMWELL, G. E. CARLTON, A. J. COLLINS, P. E. HAMS, W. R. CHAMBERLAIN, M. O. FRITZO, R. RAYMOND, A. KENDALL, H. N. NELSON, G. E. SANDERS, M. SCOFIELD, M. BISHOP, H. W. SHEPPARD, G. C. THOMPSON, C. A. H. WIKENTER, L. AYER, H. P. GRAY, C. E. MCCLENNON, C. L. EHMANN, R. E. RILENTEN, L. E. CHURCH, A. L. REBE, G. E. JOHNS, M. E. LIWANDALL, F. E. GARCIA, M. L. MACHADO, H. T. LEIBER, W. L. DAVENPORT, F. G. GRANNIS, JEWELL INVESTMENT CO., [fol. 3] R. RONCHS, K. N. KRUSE, N. CRANE, T. C. RADD, S. H. OGILBI, P. MARSDON, R. MARSDON, S. E. HITCHINGS, J. JOYCE, C. T. BLOMM, E. F. ALLEN, R. A. ALLEN, F. H. LISTER, H. A. WINGARD, M. E. HUNTINGTON, A. L. ALLEN, E. F. O'GORMAN, JOHN DOE, RICHARD DOE, FIRST DOE, and SECOND DOE, and LOUIS WEULE, Defendants.

BILL OF COMPLAINT—Filed Jan. 18, 1923

Plaintiff complains of the defendants and for cause of action alleges:

I

That on all of the dates and times herein mentioned, defendants in the caption hereof named as J. Hendry Company, Marshall Newell Supply Company, Chas. C. Moore Company, Knowland Company and Jewell Investment Co., were and now are corporations organized and existing under the laws of different states of the United States, the particular states of which organizations plaintiff does not know.

II

That the true names of the defendants in the caption hereof named as John Doe, Richard Roe, First Doe and Second Doe, are unknown to the plaintiff and he therefore prays that when such true names are ascertained, this complaint may be amended by the insertion [fol. 4] of such true names therein.

III

That on all of the dates and times herein mentioned, the defendants herein were the owners and operators of a certain vessel engaged in the merchant service of the United States of America, the home port of such vessel on all of the dates and times herein mentioned, being the Port of San Francisco, State of California, the said vessel being named the "Davenport."

IV

That prior to the 30th day of April, 1921, plaintiff was hired and employed by the defendants to work as a sailor on said vessel "Davenport" at the wages of $90.00 per month, and his board and lodging, said hiring taking place at the City and County of San Francisco, State of California, and thereafter said vessel left said San Francisco with plaintiff on board as such sailor and at said rate of wages and proceeded to Hoquiam in the State of Washington, at which place she took on board a cargo of lumber to be carried from said Hoquiam to the State of California, and there discharged and used, and plaintiff in pursuance of such hiring and employment signed shipping articles for such voyage.

V

That said vessel left said San Francisco on said voyage on or about the 20th day of April, 1921, at which time she was unseaworthy and so sontinued up to the time plaintiff was injured as hereinafter [fol. 5] stated, and the appliances on said vessel were defective in this, that there was on board of said vessel and necessary to be used thereon in carrying said cargo of lumber, an appliance called a chain lashing upon which chain lashing there was a necessary part thereof a hook called a pelican hook, that during the times herein stated said pelican hook was defective in this, that it had a flaw therein which was observable upon ordinary inspection, but no inspection was made of said hook by defendants or any thereof, and on said 30th day of April, 1921, at said Hoquiam, while plaintiff was as such sailor aforesaid assisting in placing said chain lashing around the upper part of said cargo of lumber on said vessel, the said pelican hook broke by reason of the flaw aforesaid which caused the said chain lashing to spring back and strike the plaintiff on the frontal bone of his the plaintiff's skull and fractured his said skull, by

reason of which plaintiff was compelled to go to hospital for treatment and there remain for about 14 days and has been under surgical treatment for such injuries ever since, and has lost the ability to bend his back, and lost the sense of smelling, and has suffered great physical pain and mental suffering and now and for a long time to come will suffer such physical pain and mental suffering, and is permanently injured as aforesaid, all to his damage in the sum of Fifty Thousand ($50,000.00) dollars, none of which has been paid.

VI

That the actions of the defendants in sending said vessel on the [fol. 6] voyage aforesaid so unseaworthy, and with such defective pelican hook were negligently done, and the said pelican hook broke at the place of the said flaw therein, and the particular part of said chain lashing that struck the plaintiff as aforesaid, were a part thereon called the turnbuckle.

Wherefore plaintiff prays judgment against said defendants for the sum of fifty thousand ($50,000.00) dollars and costs of this action.

H. W. Hutton, Attorney for Plaintiff.

[File endorsement omitted.]

In Superior Court of San Francisco County

Demurrer to Complaint and Order Thereon—Filed March 15, 1923

Comes now J. O. Davenport, one of the defendants herein, and demurs to the complaint of plaintiff on file herein upon the following grounds:

I

That said complaint does not state facts sufficient to constitute a cause of action against this defendant or at all.

II

That said complaint and the alleged cause of action therein set [fol. 7] forth is barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure.

Wherefore, this defendant prays that it be hence dismissed with its costs of suit herein incurred.

McCutchen, Olney, Mannon & Greene, Attorneys for said Defendants.

We hereby certify that the foregoing demurrer is in our opinion well founded in point of law and that the same is not interposed for delay.

McCutchen, Olney, Mannon & Greene, Attorneys for said Defendants.

[File endorsement omitted.]

Minute Order Sustaining Demurrer to Complaint

Thursday, August 2, 1923.

Present: Honorable Franklin A. Griffin, Judge, and officers of the court.

The demurrer of defendant J. O. Davenport to complaint, having been heretofore submitted to the court for decision and the court having fully considered the same, it is ordered that the said demurrer be and the same is hereby sustained without leave to amend.

[fol. 8] (Entered in minutes of department No. 5, Volume 178, page 288.)

In Superior Court of San Francisco County

Judgment—Filed Aug. 6, 1923

In Open Court August 2, 1923

The demurrer of defendant J. O. Davenport to complaint having been heretofore submitted to the court for decision and the court having fully considered the same it is ordered that the said demurrer be and the same is hereby sustained without leave to amend.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that E. B. Engel, plaintiff, do take nothing by this said action as against J. O. Davenport, one of the defendants, but that judgment be and the same is hereby entered herein in favor of said defendant and against said plaintiff for said defendant's costs and disbursements incurred in this action, amounting to the sum of $—.

(Endorsed:) Recorded Aug. 4, 1923, 11.50 o'clock A. M. Vol. 203, page 1. H. I. Mulcrevy, Clerk, by R. F. Galloway, Deputy Clerk.

[fol. 9] Clerk's certificate to foregoing paper omitted in printing.

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

NOTICE OF APPEAL—Filed Aug. 6, 1923

To the Clerk of the Superior Court of State of California in and for the City and County of San Francisco:

You will please take notice: that plaintiff hereby appeals to the Supreme Court of the State of California, from the judgment given [fol. 10] and made by said Superior Court, on the 4th day of August, 1923, in the above cause, in favor of defendant J. O. Davenport, and against the plaintiff herein, upon the order of said Superior Court, given and made on the 2nd day of August, 1923, sustaining the demurrer of said J. O. Davenport to plaintiff's complaint herein, without leave to amend, and from the whole and every part of said judgment.

Dated August 6, 1923.

H. W. Hutton, Attorney for Plaintiff and Appellant.

[File endorsement omitted.]

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains, full, true and correct copies of all the papers therein set forth now on file in the office of the county clerk of the City and County of San Francisco, State of California; that the minute orders therein contained are full, true and correct copies thereof as made and entered in the minutes of the Superior Court; that the said foregoing papers shall constitute the transcript on appeal in this cause and that the appeal may be heard and determined thereon.
[fol. 11] Dated August 17th, 1923.

McCutchen, Olney, Mannon & Greene, Attorneys for Respondent. H. W. Hutton, Attorney for Appellant.

IN SUPERIOR COURT OF SAN FRANCISCO COUNTY

CLERK'S CERTIFICATE—Filed Aug. 17, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court in and for said City and County, hereby certify that I have

compared the foregoing transcript with the original papers in said action, now on file in my office, and with the orders therein made and entered in the minutes of said court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that the erasures and interlineations appearing in the foregoing transcript were made before certifying thereto.

In Witness Whereof I have hereunto set my hand and affixed the [fol. 12] seal of said Superior Court this — day of August, 1923.

H. I. Mulcrevy, Clerk, by —— ——, Deputy Clerk. (Seal.)

[File endorsement omitted.]

In Supreme Court of California. In Bank

Argument and Submission

The Supreme Court of California met in bank in its courtroom State Building, San Francisco, at ten o'clock A. M. this day. Present: Myers, C. J., presiding; Lawlor, J.; Lennon, J.; Waste, J.; Seawell, J.; Richards, J.; Shenk, J.; Taylor, Clerk, Lafferty, reporter; Hinkle, bailiff.

S. F. 10816. Engel v. Davenport. Hearing on merits. H. W. Hutton, Esq., appearing on behalf of appellant; J. B. McKeon, Esq., appearing on behalf of respondent. Cause argued and submitted.

[fol. 13] In Supreme Court of California, In Bank, August 25, 1924

S. F. No. 10816

E. B. Engel, Plaintiff and Appellant,

v.

J. O. Davenport et al., Defendants and Respondents.

Opinion—Filed Aug. 25, 1924

This is an appeal by the plaintiff from a judgment rendered and entered by the Superior Court in and for the City and County of San Francisco in favor of the defendants, based upon an order sustaining the demurrer of J. O. Davenport, one of the defendants, to the plaintiff's complaint. The action, which was instituted in the Superior Court of the City and County of San Francisco, was brought against J. O. Davenport and the other defendants jointly, as the owner and the operators of the steamship "Davenport". The complaint alleged in substance that the plaintiff had suffered injuries

because of the unseaworthiness of the vessel's appliances and in this behalf alleged that the vessel was unseaworthy when she left San Francisco, her home port, for Hoquiam, Washington, by reason of a defective pelican hook which broke at Hoquiam, Washington, [fol. 14] fracturing plaintiff's skull. For this injury plaintiff claimed damages in the sum of $50,000.00. Said complaint was filed in said Superior Court on the 18th day of January, 1923, twenty-one months after the injury to plaintiff which forms the basis of the action.

The defendant J. O. Davenport demurred upon two grounds, (1) that the complaint did not state facts sufficient to constitute a cause of action and, (2) that the alleged cause of action was barred by the provisions of section 340, subdivision 3, of the California Code of Civil Procedure, which provides that actions based upon personal injury must be commenced within one year. It is apparent that if the state statute of limitations is applicable, the demurrer was properly sustained.

It is plaintiff's contention that the plaintiff's cause of action is brought under the provisions of the Merchant Marine Act of June 5, 1920 (41 Stats. at large 1007), which amended section 20 of the Seaman's Act of March 4, 1915 (38 Stats. at Large, 1164); that section 33 of the Merchant Marine Act incorporates therein by reference the Federal Railway Employers' Liability Act of 1908 (35 Stats. at Large 65) as amended in 1910 (36 Stats. at Large, 291); that this last mentioned act provides a two year limitation for the commencement of actions brought under it; and that, therefore, such limitation applies to actions brought by seamen under the Merchant Marine Act.

Section 33 of the Merchant Marine Act, upon which plaintiff relies, reads as follows:

[fol. 15] "Any seaman who shall suffer personal injury in the course of his employment, may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Section 6, of the Federal Employers' Liability Act, claimed by plaintiff to be incorporated by reference into the Merchant Marine Act provides that, "No action shall be maintained under the act unless commenced within two years from the day the cause of action accrued. Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the

defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under [fol. 16] this Act, shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

It is the defendants' contention that, (1) if brought under section 33 of the Merchant Marine Act, the state court was without jurisdiction to entertain the action and, (2) whether brought under the Merchant Marine Act, as plaintiff contends, or under the general marine law as defendants contend, the one year state statute of limitations is applicable.

In the former opinion rendered by this court it was held that if the action was brought under section 33 of the Merchant Marine Act the state court was without jurisdiction, and if brought under the general maritime law, the state statute of limitations was applicable, so that in either event the demurrer was properly sustained. The holding that the federal court had exclusive jurisdiction of all actions brought under section 33 of the Merchant Marine Act was based upon the theory that Congress plainly indicated an intention to vest exclusive jurisdiction of all cases arising under said section in a court in the district in which the defendant employer resided, by the provision of said section previously quoted, that "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located". This theory was sustained by decisions of the Supreme Court of New York (Nox v. U. S. Shipping Board Emergency Fleet Corporation, 193 N. Y. S. 340; Preto v. U. S. Shipping Board Emergency Fleet [fol. 17] Corporation, 193 N. Y. S. 342), and the District Court of Washington (Wenzler v. Robin Line S. S. Co., 277 Fed. 812.)

However, the Supreme Court of the United States in a very recent decision (Panama Ry. Co. v. Johnson, 44 Sup. Ct. Rep. 391) held, in effect, that this provision of the Merchant Marine Act did not confer exclusive jurisdiction upon the particular district court of the district in which the defendant employer resides and thereby by implication divest all other courts previously having jurisdiction of such actions, of jurisdiction, but merely defined the venue of an action instituted in a district court. The court in that case held that a complaint having been filed in a district court of a district other than the one in which the defendant employer resided, and no objection having been made at the outset on a special appearance, any objection to the venue was waived by the general appearance and the court where the complaint was filed had jurisdiction. The court in this behalf said: "A reading of the provision now before us * * * makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the District Courts * * * but only to prescribe the venue for actions brought under the new act of which it is a part." It follows that if this provision merely defines the "venue" of an action, the theory

that such provision conferred "jurisdiction" upon a particular court [fol. 18] is no longer tenable. And in the absence of any other provision purporting to divest of jurisdiction those courts, both state and federal, which, prior to the enactment of the Merchant Marine Act had jurisdiction of such actions, such jurisdiction may be presumed to continue.

We are satisfied that the state courts have always had the right to enforce rights of action for personal injuries to seamen arising under maritime transactions, including those arising out of maritime torts, since the Federal Judiciary Act of 1789, which provided that district courts should have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." (Judical Code, secs. 24 and 256.) (Comp. Stats. secs. 991 and 1233); The Hamilton, 207 U. S. 398, 404; Steamboat Company v. Chase, 83 U. S. 522, 534; Leon v. Galceran, 11 Wall. 185; Knapp, Stout & Co., v. McCaffrey, 177 U. S. 638.) In enforcing a liability falling within the admiralty and maritime jurisdiction, the state court was, however, bound to apply the maritime law. (Southern Pacific Co., v. Jensen, 244 U. S. 205; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372.)

The present action is based, not upon negligence, but upon the alleged unseawothiness of the vessel "Davenport", by reason of a defective pelican hook, and there can be no question but that in such an action the state courts, prior to the enactment of the Merchant Marine Act, did have and did exercise jurisdiction in such [fol. 19] cases. This was definitely decided in the case of Carlisle Packing Co., v. Sandanger, 259 U. S. 255, and is, in fact, conceded by the defendants. This being so, it follows that the state courts still have jurisdiction over such an action and that the plaintiff could at his election institute the action in the state court.

It is the plaintiff's theory, as hereinbefore indicated, that section 33 of the Merchant Marine Act incorporates therein, by reference the Federal Railway Employer's Liability Act, which latter act provides a two-year limitation for the commencement of actions brought thereunder, and that therefore, the two-year limitation for the commencement of actions applies to this action irrespective of whether it was commenced in a state or federal court. In other words, it is plaintiff's contention that the statute of limitation embodied in the Federal Employer's Liability Act applies to every cause of action stated thereunder or under the Merchant Marine Act regardless of the jurisdiction in which such action is brought. Plaintiff's theory that the Federal Employer's Liability Act was incorporated by reference in the Merchant Marine Act was upheld in the case of Martin v. United States Emergency Fleet Corporation, a recent decision of the United States District Court of New York, rendered June 6, 1924. However, in the case of Lorang v. Alaska S. S. Co., et al., a recent decision of the United States District Court of Washington, decided May 14, 1924, this contention [fol. 20] was expressly repudiated.

Conceding, however, for the sake of argument, that the provision of the Federal Employer's Liability Act fixing the period of time within which actions brought thereunder must be commenced at two years was incorporated by reference into the Merchant Marine Act and would be applicable when the action was brought in a Federal Court, we are of the opinion that the instant action having been originally, and rightfully instituted in the state court, is governed and barred by the state statute of limitations. It is the general rule that the lex fori, i. e. the limitation statute of the jurisdiction where suit is brought, will govern and control with reference to the prescribed period of time within which a suit may be brought in that particular jurisdiction. Plaintiff, however, contends that when a time limit appears in a statute creating a right, that time limit is exclusive of all others. Plaintiff also insists that it is not essential that the limitation be incorporated in the same section or even in the same statute providing the limitation embodied in another statute is so specifically directed to the newly created liability as to warrant the conclusion that it qualifies the right.

It is true that there is an exception to the general rule that the law of the forum controls to the effect that when a statute which creates a new liability limits the time within which the right may be enforced, an action seeking to enforce such right can be maintained [fol. 21] only within the time limited by the statute creating the right, regardless of the jurisdiction in which the action was instituted. (Davis v. Mills, 194 U. S. 451, 454; The Harrisburg, 119 U. S. 199, 214; Vaught v. Virginia & Southwestern Railroad 132 Tenn. 679.) Such exception to the general rule is not, in our opinion applicable to the instant case.

The exception to the general rule that the law of the forum governs is based upon the reasoning that when the liability and the remedy are created by the same statute, time is made of the essence of the right, and when the time prescribed by the statute has expired, the cause of action itself is extinguished. The lapse of time prescribed by the statute creating the new right having operated to extinguish the right, no right remains thereafter to support the action and consequently no action can be thereafter maintained in any jurisdiction. Obviously this reasoning applies only when the period prescribed by the statute creating the liability is shorter than the period provided by the law of the forum. There is no logical reason why the doctrine that the limitation prescribed by the statute of another jurisdiction, which creates a right of action, is a condition of the right of action so that the latter is extinguished when the time so prescribed has expired, and will not thereafter sustain an action anywhere, should exclude the operation of the general rule which refers the question of limitation to the law of the forum, if the period prescribed by the statute of the other jurisdiction creating [fol. 22] the liability has not expired. (46 L. R. A. (N. S.) 687.) The exception to the general rule being based upon the theory of the extinguishment of a right by the lapse of time, if the time prescribed by the statute creating the right is longer than the time

provided by the law of the forum, such actions will not fall within the exception but will be governed by the general rule that the law of the forum—in the instant case, the state statute of limitations—will prevail. (Weaver v. Baltimore & O. T. Co., 21 D. C. 499; Hutchings v. Lamson, 96 Fed. 720; Wharton on Conflict of laws, 3rd. ed. Sec. 540B, Vol. 2, p. 1261.) The reason for the exception ceasing to exist the exception itself ceases to exist.

The judgment is affirmed.

Lennon, J.

We concur: Seawell, J.; Richards, J.; Lawlor, J.; Waste, J.; Shenk, J.; Myers, C. J.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

On Appeal From the Superior Court in and for the City and County of San Francisco

JUDGMENT—Filed Aug. 25, 1924

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged and decreed by the Court that the judgment of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby affirmed. Respondent to recover costs of appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 25th day of August, 1924, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 25th day of September, A. D. 1924.

B. Grant Taylor, Clerk, by I. M. Johnson, Deputy.

4592.

[fol. 24] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING AND MODIFYING OPINION—Filed Sept. 24, 1924

By the COURT:

The petition for a rehearing is denied. That portion of the opinion however, which deals with the plaintiff's right of election to institute the action in the State Court is amended and modified to read as follows: "This being so, it follows that the State Courts still have jurisdiction over such an action and that the plaintiff could at his election institute the action in the State Court unless such jurisdiction has been divested by the adoption of the Workmen's Compensation Provisions of our constitution and statutes, a question which we shall not now undertake to decide. (68 Cal. Dens. at p. 174)."

Dated September 22, 1924.

[File endorsement omitted.]

IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 24, 1924

[fol.25] Plaintiff and appellant designates and files the following assignment of errors upon which he will rely on his petition to the Supreme Court of the United States, for a Writ of Certiorari to review the proceedings of the Supreme Court of the State of California and its decision and final decree in the above cause, and in that behalf shows and says:

That the said Supreme Court of the State of California, erred in its proceedings, and its decisions and judgement in the above-entitled cause, in the following particulars:

1. In finding and deciding that the statute of limitations contained in Section 6 of the Act of Congress of April 5th, 1910, 36 Stat. 291, reading in part:

"Section 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

did not apply to plaintiff and appellant's cause of action.

2. That the said Supreme Court of the State of California, erred finding and deciding that the statute of limitations of the State California, applied to plaintiff and appellant's cause of action.

3. That the said Supreme Court of the State of California, erred not finding and deciding that the Workmens Compensation Laws the State of California, did not apply to plaintiff and appellant's use of action.

H. W. Hutton, Attorney for Plaintiff and Appellant.

[File endorsement omitted.]

[fol. 26] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 24, 1924

To the Clerk of the Supreme Court of the State of California:

Please prepare for the purpose of a petition to the Supreme Court for a Writ of Certiorari in the above cause, a certified copy of the following papers, to-wit:

1. The transcript of the proceedings in the Superior Court of the State of California, in and for the City and County of San Francisco said cause.

2. The minute order of the Supreme Court of the State of California submitting said cause for decision, given and made on the 8th day of May, 1924.

3. The opinion of said Supreme Court of the State of California, dated August 25, 1924.

4. The final judgment of said Supreme Court of the State of California herein.

5. The assignment of errors.

6. This request for said transcript, and the order of said Supreme Court of the State of California, denying plaintiff and appellant's [fol. 27] petition for a rehearing, and modifying its opinion of date August 25, 1924.

Yours etc., H. W. Hutton, Attorney for Plaintiff and Appellant.

[File endorsement omitted.]

In Supreme Court of California

[Title omitted]

Clerk's Certificate

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing consisting of twenty-eight pages including the next page, is a full, true and correct and complete Transcript of the Record on Appeal in this Court, comprising the record on appeal from the Superior Court of the State of California, in and for the City and County of San Francisco to [fol. 28] this Court, Minute order submitting said Appeal, opinion of the Court thereon, final judgment on said appeal, order denying a rehearing, and modifying opinion, assignment of errors, and præcipe for preparation of said record, and I further certify: That the said Supreme Court of the State of California, is the Court of last resort in this State on said Appeal.

In witness whereof, I have hereunto set my hand, and affixed the Seal of the Court this 11th day of October, A. D. 1924.

B. Grant Taylor, Clerk of Supreme Court of the State of California, by A. V. Haskell, Deputy Clerk Supreme Court
(Seal of the Supreme Court of California.)

Oct 11, 1924.—Cost of preparation and certification of this record was $5.20. A. V. Haskell.

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR CERTIORARI—Filed December 15, 1924

On Petition for Writ of Certiorari to the Supreme Court of the State of California

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of California, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(8097)

In the Supreme Court
OF THE
United States

OCTOBER TERM, [redacted] 1925

No. [redacted] 189

E. B. EBERLE,
Petitioner,

vs.

J. O. DAVENPORT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To be Directed to the Supreme Court of the State of California.

H. W. HUTTON,
Pacific Building, San Francisco,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

No.

E. B. ENGEL,
Petitioner,

vs.

J. O. DAVENPORT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To be Directed to the Supreme Court of the State of California.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

E. B. Engel, petitioner, having been denied the right to commence an action for personal injuries at any time within two years from the receipt of such injuries, which right is given to him by a statute of the United States, to wit, the following part of Section 6 of the Act of Congress of April 5, 1910,

incorporated by reference in Section 33 of the Merchant Marine Act of June 5, 1920 (Jones Act), to wit:

> "Section 6. That no action shall be commenced under this act unless commenced within two years from the day the cause of action accrued."

presents this his petition to this honorable court and prays that a writ of certiorari may issue herein, directed to the Supreme Court of the State of California, and its clerk, it being the highest court of said state, directing it to certify to this honorable court its record and proceedings in the within case, with its opinion for the review and determination of said cause by this court.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The matter involved herein, is whether the period of limitation prescribed in the above Section 6, or the state statute of limitation of one year controls in a cause brought by a seaman engaged in interstate commerce, for personal injuries received while in pursuit of his calling, and in that behalf petitioner shows, that on the 18th day of January, 1923, he filed his complaint in the Superior Court of the State of California, in and for the City and County of San Francisco, wherein he alleged that he was employed in said City and County to serve

as a seaman on a vessel called the "Davenport" and while so employed the vessel went to Hoquiam in the State of Washington for a load of lumber to be brought to the State of California, and that on the 30th day of April, 1921, while he was so serving on said vessel at said Hoquiam he was severely injured by reason of the breaking of a defective pelican hook.

His cause of action is clearly within the terms of said Section 33 of the Jones Act, and the Federal Employers Liability Act incorporated in said Section 33 by reference.

His action was brought 20 months and 18 days after the receipt of the injury. The lower court sustained a demurrer to his complaint, one ground of which was general and the other a plea of the statute of limitations, and the demurrer was sustained without leave to amend. Upon appeal two questions were presented to the said Supreme Court, one whether a state court had jurisdiction of a cause of action brought under said Section 33 of the Jones Act, the court finding in petitioner's favor on that question; the other, whether the two year limitation in the above mentioned Section 6 or the one year limitation prescribed by the state law applied, the said court holding that the state limitation of one year and not the federal statute of two years applied, the fact that both questions were raised showing in the opinion of said Supreme Court of the State of California herein.

II.

GENERAL REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT.

The question of whether the federal or state statute of limitations applies to a cause of action of this character is one of national importance, and of the utmost importance to shipowners who live in about every state in the union, and whose vessels ply on all the seaboard states, and also to seamen who ply from state to state and from coast to coast, the different states having varying periods of limitation in actions for tort; therefore, if this decision is allowed to stand, it is likely that when a seaman sues in a state court, such court in any state he sues would be likely to follow it, whether its statute of limitations is shorter or longer than the period given in Section 6 above mentioned, and the uniformity that Congress sought when it established the two year limitation for actions of this character will be completely destroyed, courts even now are holding both ways on the question.

As evidence of that we have the decision herein, and the following in a case that seems to be unreported, to wit: the case of Elizabeth Beer, etc. v. Clyde Steamship Co., decided by the United States District Court for the Southern District of New York, December 3, 1923, in which that court, speaking through Judge Hand, says:

> "I can see no reason why the provision in the Employers' Liability Act preventing removal is not as fully incorporated in the Jones Act by reference as the provision that

no action shall be maintained unless commenced within two years, * * *."

Again, petitioner had a right given to him by the Act of Congress to bring his action at any time within two years; he commenced his action well within that time, and the state court has held that he should have brought it within one year, and he thus has been deprived of a right given to him by a statute of the United States. And again we respectfully submit, that the question of whether the period prescribed by Congress is shorter or longer, is immaterial in this case; the question involved is, which is the paramount law?

III.

BRIEF IN SUPPORT OF PETITION.

I.

The Decisions Are Uniform That When Congress Legislates on a Subject Within its Powers, its Legislation Supersedes All State Laws.

We do not think it necessary to cite any but the following authorities in support of the above heading:

Arnson v. Murphy, 109 U. S. 238-243:

"It follows that in such cases, of which the present case is one, the limitation laws of the State in which the cause of action arose, or in which the suit was brought do not, under sec. 721 R. S. furnish the rule of decision and that it was, therefore, an error in the Circuit Court

to apply, as a bar to the action, the limitation prescribed by the Statute of New York."

Mitchel v. Clark, 110 U. S. 633-643:

"If Congress has a right to legislate on this subject, it has the right to make that legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration."

In Atlantic Coast Line Ry. v. Burnette, 239 U. S. 199, a cause of action arose under the Railway Employers' Liability Act, carried into Section 33 of the Merchant Marine Act by reference, and the statute of limitation of North Carolina, where the action was brought, prescribed a period longer than two years, this court said, on page 200:

"The second objection was met by deciding that the limitation of two years imposed by Sec. 6 could not be relied upon for want of a plea setting it up.

It would seem a miscarriage of justice if the plaintiff should recover *upon a statute that did not govern the case,* in a suit that the same act declared too late to be maintained." 201.

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. Central Vermont Railway v. White, 238 U. S. 507, 511. But irrespective of the fact that the Act of Congress is paramount, when a law relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been

> disinclined to press the obligation farther. Davis v. Mills, 194 U. S. 451, 454; The Harrisburg, 119 U. S. 199. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 667. At all events *the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law* emanating from a *different source*. Winfree v. Northern Pacific Ry., 227 U. S. 296, 302. If it be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a State as in those of the United States."

It can make no difference whether the state statute is longer or shorter, it is uniformity that is sought, and whether the authority of Congress is paramount.

> Patrone v. Howlett Inc., 143 N. E. 232:
>
> "But plaintiff did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law."

The question of what statute of limitations applies when Congress legislated, is fully discussed in

> Davis v. Mills, 194 U. S. 451-454,

and in

> Vaught v. Virginia & S. W. Ry. Co., 132 Tenn. 678-681;
>
> Sandstrom v. P. S. S. Co., 260 Fed. 661;

El Paso & N. E. Ry. Co. v. Guiterris, 215 U. S. 87;

Mondau v. New York, etc., 223 U. S. 1.

Some of those cases being on the law in question herein.

The parts of the statutes applicable to this read as follows:

Sec. 33 of the Merchant Marine Act of 1920:

> "Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

It was held by this court with reference to the above Section 33 in

Panama Railway Company v. Johnson, 44 Sup. Court Rep. 391:

> "Thus its origin, environment and subject-matter show that it is intended to, and does, bring the rules to which it refers into the maritime law."

One of the rules there referred to, is the rule as to the period in which a cause of action expires, and reads as we have stated on page 1 hereof:

> "Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued. * * *"

Petitioner petitioned for rehearing of the above point before the Supreme Court of California, the petition was denied September 22nd, but not announced by the court until September 24, 1924, the last day on which it could be announced, and on the same day petitioner served and filed his assignment of errors and request for a certified copy of the record in the said Supreme Court.

We respectfully submit, that unseaworthiness of a vessel can only arise from negligence, and that it was error for the Supreme Court of the State of California to decide that the state statute of limitations applied to petitioner's cause of action, and that the writ should issue herein as prayed for.

Dated, San Francisco,
October 11, 1924.

H. W. HUTTON,
Attorney for Petitioner.

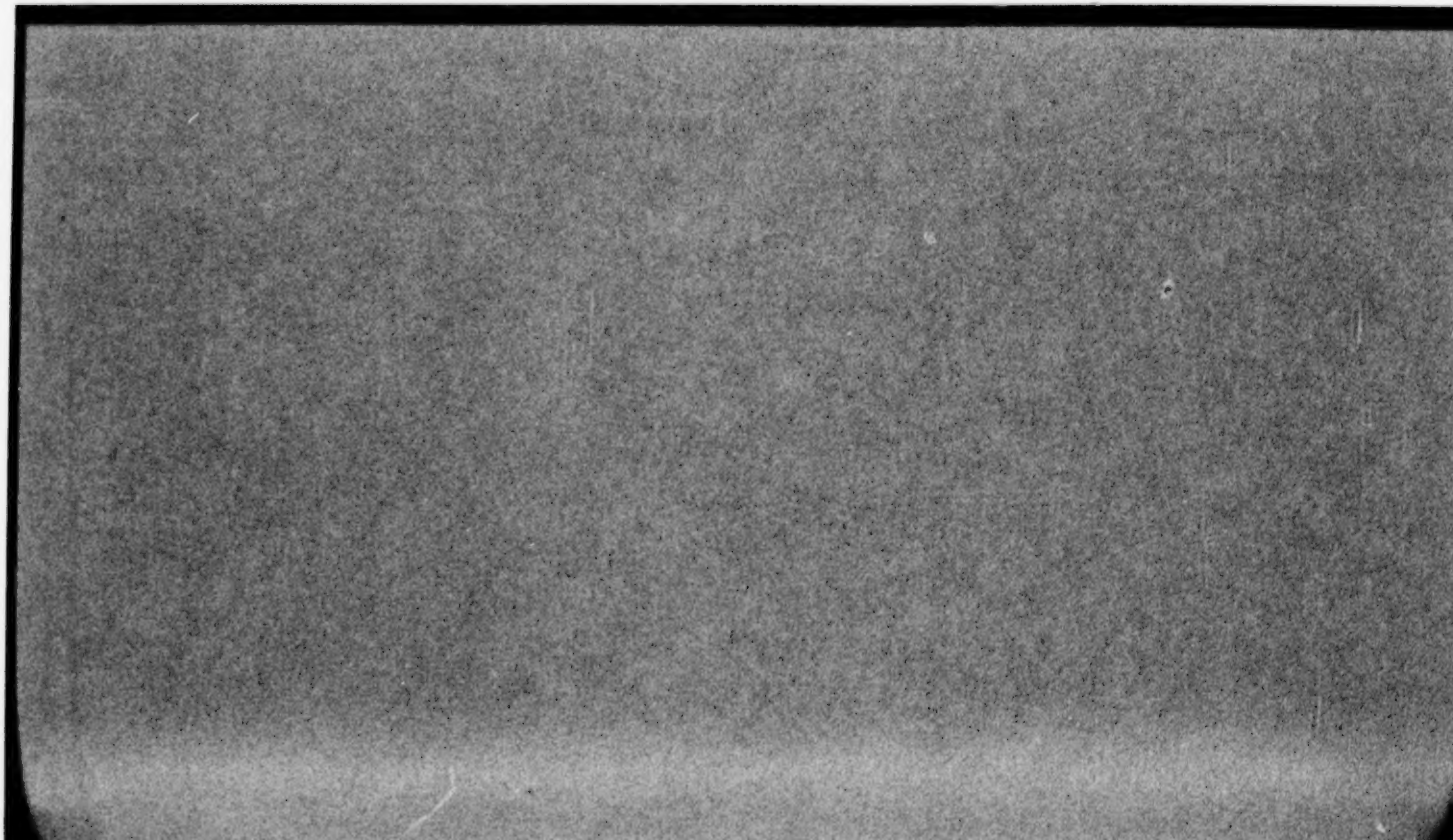
Notice of Time and Place of Submission of the Foregoing Petition.

To the respondent in the above entitled cause, and to Messrs. McCutchen, Olney, Mannon & Greene, attorneys for respondent.

Please take notice that on Monday, the 17th day of November, 1924, at the opening of the court on that day, or as soon thereafter as counsel can be heard, E. B. Engel, petitioner herein, will submit the foregoing petition for a writ of certiorari to the Supreme Court of the United States, in the court room of said court, at the Capitol at the City of Washington, District of Columbia.

H. W. Hutton,
Attorney for Petitioner.

Dated, San Francisco,
October 11, 1924.



Due service and receipt of a copy of the within is hereby admitted

this _____ day of October, 1934.

_____

Attorneys for Respondents.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL, *Petitioner,*

vs.

J. O. DAVENPORT, et al., *Respondents.*

BRIEF FOR PETITIONER.

H. W. HUTTON,
Pacific Building, San Francisco,
Attorney for Petitioner.

PHELAN-WALSH PRINTING CO., SAN FRANCISCO

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL, *Petitioner,*

vs.

J. O. DAVENPORT, et al., *Respondents.*

BRIEF FOR PETITIONER.

I.

STATEMENT OF FACTS.

Petitioner, a seaman, was injured on an American merchant vessel engaged in interstate commerce on the 30th day of April, 1921. Twenty-one months and eighteen days, thereafter, he filed his complaint in the Superior Court of the State of California, in and for the City and County of San Francisco, praying damages for such injuries, the complaint alleging that he was injured by reason of the breaking of a defective pelican hook.

The said Superior Court, sustained a demurrer to his complaint without leave to amend, and upon appeal to the Supreme Court of the State of California, the court of last resort in the state, two questions were presented, as follows:

1st. Whether a state court had jurisdiction over the action.

2nd. Whether the state statute of limitations of one year, or the time given by Section 6, of the Act of Congress of April 22, 1908, 35 Stat. 65, as amended by the Act of April 5, 1910, 36 Stat. 291, which reads:

> "Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.
>
> Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no cause arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

applied to petitioner's case.

The said State Supreme Court first decided that it did not have jurisdiction over the cause of action, but was silent on the statute of limitations applicable.

But, on a petition for a rehearing which was granted, its final decision was, that a state court had jurisdiction over the cause of action, but that the state statute of limitations of one year, it reading,

Sub. 3, Sec. 340, of the Code of Civil Procedure of the State of California, as follows:

> "340. Within one year. * * *
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged check,"

applied. (Tr. pp. 10, 11.)

Engel v. Davenport, 194 Cal. 244, 350, 351, 352.

Petitioner, thereupon petitioned this court for a writ of certiorari to the said Supreme Court of the State of California, asserting that he had been denied a right given to him by a statute of the United States, to-wit, that of bringing his action within two years from the date of the injury, and the court granted the writ, and the case is now before this court for hearing on the merits.

II.

ASSIGNMENT OF ERRORS.

The assignment of errors is found on pages 12 and 13 of the transcript, and read:

> "That the said Supreme Court of the State of California, erred in its proceedings, and its decision and judgment, in the above entitled cause, in the following particulars:
>
> 1. In finding and deciding that the statute of limitations contained in Section 6 of the Act of Congress of April 5th, 1910, 36 Stat. 291, reading in part:
>
> 'Section 6. That no action shall be maintained under this act unless commenced within two years

from the day the cause of action accrued,' did not apply to plaintiff and appellant's cause of action.

2. That the said Supreme Court of the State of California, erred in finding and deciding that the statute of limitations of the State of California, applied to plaintiff and appellant's cause of action.

3. That the said Supreme Court of the State of California, erred in not finding and deciding that the Workmen's Compensation Laws of the State of California, did not apply to plaintiff and appellant's cause of action."

III.

ARGUMENT.

CONGRESS INCORPORATED THE WHOLE OF THE ACT OF APRIL 22, 1908, AS AMENDED BY THE ACT OF APRIL 5, 1910, IN SECTION 33, OF THE JONES ACT.

Of course, where the language of any part of the Railway Employers Liability Act is clearly only applicable to railway employees, that of itself would fall by its own expression, but as to the rest of the act, there can be no uncertainty about what Congress did. It intended to, and it did, place seamen in exactly the same position as railway employees, excepting only that it did limit the place of trial, the venue of the action, to the residence of the defendant, in Sec. 33 of the Merchant Marine (Jones) Act of June 5, 1920, 41 Stat. 938. Said Section 33, reading:

"Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for dam-

> ages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.' "

The language relating to death is somewhat different to that relating to personal injuries, but the intention of Congress is clear, and the language is intended to, and it does, embrace "all statutes," relating to injuries, and "all statutes" regulating the right of action for death, and puts seamen engaged in interstate commerce, exactly where railway employees engaged in the same interstate commerce stand.

If that had not been the intention, and Congress had not concluded that Section 6 applied, there would have been no occasion for the following language:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located."

As that would have been covered by Section 51 of the Judicial Code, which reads:

> "Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six

> succeeding sections, *no civil suit* shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." * * *

There is nothing in any of the six succeeding sections that covers the case of personal injuries to seamen. And it is clear, that if Congress had not thought that the whole of Section 6 aforesaid applied, and particularly the following language therein;

> "or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action,"

it would not have modified that language by adding the above as to jurisdiction over actions under Section 33. The mere fact that it so modified it, shows clearly it intended the rest to stand as being carried into the said Merchant Marine (Jones) Act.

We find in said Section 33:

> "All statutes of the United States * * * shall apply."

Necessarily, all statutes, means the whole of every part of every statute, not parts or pieces of a statute. The word used is *"all"*.

The intervening language reading:

> "modifying or extending the common-law right or remedy in cases of personal injury to railway employees," * * *

were clearly used by Congress as words of indentification to identify the "All statutes of the United States" which "shall apply" and not as words of limitation to limit the application of all or any of the provisions of the Federal Employers Liability Act.

And nowhere in the section can we find any language that said that any state statute, limitation, or other, can apply.

To eliminate said Section 6 from Section 33 of the Jones Act, would violate one of the cardinal rules of statutory construction, namely, that every word of a statute must be given effect if possible and the statute as a whole be interpreted according to the intent of the statute makers.

The elimination of said Section 6, would make non-effective, the words

> "all statutes of the United States * * * shall apply,"

and give exclusive effect to the words,

> "modifying or extending the common-law right or remedy."

We submit, that the clear intention of Congress was to place seamen under the provisions of "certain all statutes of the United States." That was its policy. Place seamen where railway employees are placed, and then for the purpose of identifying the statutes it had in mind, it used the language

> "modifying or extending the common-law right or remedy."

The policy of the law cannot prevail over the letter of the law.

Fillinwider v. Southern Pac. Ry. Co., 248 U. S. 409.

We think this court has fully decided that the whole of the above Federal Employers Liability Act applies to seamen, in

Panama Ry. Co. v. Johnson, 264 U. S. 375,

in the following language:

p. 388:

> "On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules.
>
> The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

A state statute of limitation is a part of a non-maritime system.

p. 294:

> "The reference, as is readily understood, is to the Employers Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and its amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference." (Citations.)

This court clearly states in that language, that the words,

> "modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply,"

were words of reference, referring to the statute that should apply and of course, being words of reference they cannot be used as words of limitation, as some of the courts hold.

p. 392:

"The national legislation respecting injuries to railway employees engaged in interstate commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common law rules (cases cited). Of course that legislation will have a like operation as part of this statute."

The Supreme Court of California, violated that language by applying a local statute to this case.

The Edward, decided Dec. 8, 1924; 45 Sup. Court Rep. 114-115:

"The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of principles not as a basis for meticulous discovery of conflict with an established system in matter of detail."

Washington v. Dawson & Co., 264 U. S. 219:

p. 224:

"Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits.

And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

* * * * * * *

The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

p. 225:

> "The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."

p. 228:

> "Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act April 22, 1908, c. 149, 35 Stat. 65), and thereby abrogated conflicting rules. New York Central R. R. Co. v. Winfield, 244 U. S. 147.
>
> * * * * * * *
>
> The confusion and difficulty, if vessels were compelled to comply with local statutes at every port, are not difficult to see."

The confusion that would follow if each state applied its own statute of limitations can readily be seen. We now have federal courts applying the state statute of limitations to cases arising under said Section 33 of the Jones Act, and some apply said Section 6, as we will now show.

UNIFORMITY IS WHAT CONGRESS AND THE COURTS ALWAYS SEEK IN MARITIME MATTERS.

It is the law as established by this court, that state statutes of workmen's compensation are not applicable to maritime matters on account of lack of uniformity.

We have exactly the same state of facts with respect to statutes of limitations. On the Pacific Coast, vessels leave California and go to both Oregon and Washington. Almost all vessels do. The state statute of

limitations in California, is one year. In Oregon it is two years.

> Sec. 8, Oregon Code of Civil Procedure, Lord's Oregon Laws, 1910 Ed., Vol. 1:
>
> "Within two years:
>
> 1. An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein specially enumerated."
>
> * * * * * * *

The time in Washington is three years.

> Sec. 63, Washington Code of Civil Procedure, Pierce's Washington Code 1913, Supplement:
>
> "Within three years:
>
> 2. An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated."

We are unable to find any enumerations of personal injuries anywhere else in those codes.

Lack of uniformity is apparent to vessels engaged in the Pacific Coast trade, and it also is with respect to vessels plying from the Pacific Coast to New York, as the courts on this side of the continent apply state statutes, including the federal courts, and the federal courts in New York apply the limitation in Section 6.

Beer v. Clyde S. S. Co., 300 Fed. 561.

p. 563:

> "I can see no reason why the provisions in the Employers Liability Act preventing removal is not as fully incorporated in the Jones Act by reference as the provision that no action shall be

maintained unless commenced within two years, or the provision that the jurisdiction shall be concurrent with that of the courts of the several states."

Herrera v. Pan-American Petroleum-Trans. Co., 300 Fed. 563;

Martin v. U. S. Shipping Board E. F. C., 1 Fed. 2nd Series 603.

All those decisions were by Judge Hand, and he says in the *Beer* case that Judge Garvin of the same district in the case of *Malia v. Southern Pacific Co.*, 293 Fed. 902, had held that Section 6 of the Employers Liability Act was not incorporated in Section 33 of the Jones Act, that in effect, however, by holding that cases were removable, as Section 6 was not so incorporated. Subsequently, however, Judge Garvin held in

Stranza v. U. S. Shipping Board E. F. C., 3 Fed. Rep. 2nd Series, 845,

that Section 6 was incorporated, thus reversing his former decision.

So we now have the following, as we heretofore stated. Section 6 containing the two-years clause is held a part of Section 33 by reference on the East Coast of the United States, and on the West Coast it is held that it is not so incorporated.

Petterson v. Hobbs Wall & Co., 300 Fed. 811;

Wenzler v. Robins Line S. S. Co., 277 Fed. 812.

The *Wenzler* case is one of the first reported cases on Section 33 of the Jones Act, and therein his Honor Judge Cushman, held that the whole of the Employers Liability Act was not incorporated in said Section 33,

and that Section 6 was not. It seems on a reading of the decision that the reasoning is strained, technical, and is commented on by Judges Hand and Garvin in the cases above cited, and each has declined to further follow it.

The state courts in New York expressly declined to follow it from the first.

Tammis v. Panama Ry. Co., 202 App. Div. 227 N. Y.;

Lynott v. Great Lakes Transit Co., 202 App. Div. 619 N. Y.

Said Section 6 has therefore brought about the condition that on the East Coast of the United States it is held it applies to cases of personal injury to seamen, and on the West Coast it is held directly to the contrary.

That is not the uniformity that Congress sought when it passed the Jones Act, nor is it the certainty that the law delights in. Neither is the fact that vessels plying on the Pacific Coast are confronted with a one, two and three years statute of limitations. Section 6 of the Employers Liability Act, was made a part of the maritime law by the Jones Act. This is a maritime case, and this court said, that the maritime law could not be deflected from by local laws when passing upon this same law, and the Supreme Court of California, in this case said:

Engel v. Davenport, 194 Cal. 344, 349.

"In enforcing a liability falling within the admiralty and maritime jurisdiction, the state court was however, bound to apply the maritime law."

We submit it should have been applied in this case, and we respectfully refer the court to reasoning of Judge Hand and Judge Garvin in the cases above cited, as also the positive language of this court in the *Panama Ry. Co.* case, above quoted.

WHEN CONGRESS LEGISLATES ON A SUBJECT WITHIN ITS POWERS IT LEGLISLATES FOR ALL COURTS.

Mitchell v. Clark, 110 U. S. 633, 643:

"If Congress has a right to legislate on this subject, it has the right to make that legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration."

Arnson v. Murphy, 109 U. S. 238, 243:

"It follows that in such cases, of which the present case is one, the limitation laws of the State in which the cause of action arose, or in which the suit was brought do not, under sec. 721 R. S., furnish the rule of decision and that it was, therefore, an error in the Circuit Court to apply, as a bar to the action, the limitation prescribed by the Statute of New York."

Atlantic Coast Line Ry. v. Burnette, 239 U. S. 199,

was a case under the same Employers Liability Act, and this court said:

p. 200:

"The second objection was met by deciding that the limitation of two years imposed by Sec. 6, could not be relied upon for want of a plea setting it up.

It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did

not govern the case, in a suit that the same act declared too late to be maintained."

p. 201:

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor allow substantive rights to be impaired under the name of procedure. Central Vermont Railway v. White, 238 U. S. 507, 511. But irrespective of the fact that the Act of Congress is paramount when a law relied on as a source of an obligation in tort, sets a limit to the existence of what it creates. Other jurisdictions naturally have been disinclined to press the obligation farther. Davis v. Mills, 194 U. S. 451, 454; The Harrisburg, 119 U. S. 199. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 667. At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, Whatever similar ones formerly may have been found under local law emenating from a different source. Einfree v. Northern Pacific Ry., 227 U. S. 296, 302. If it be available in a state court to found a right and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a State as in those of the United States."

Patrone v. Hewlett, Inc., 143 N. E. 232.

"But plaintiff did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law."

Davis v. Mills, 194 U. S. 451, 454;

Vaught v. Virginia & S. W. Ry. Co., 132 Tenn. 679, 681;

Sandstrom v. P. S. S. Co., 260 Fed. 661;

El Paso & N. E. Ry. Co. v. Guiterris, 215 U. S. 87;

Mondou v. New York, etc. 2nd Employers Liability cases, 223 U. S. 1.

We respectfully submit, that Congress intended to, and it did, legislate upon every part of a case for damages for injuries when it passed Section 33 of the Jones Act, and that act supersedes all state laws, and that the Supreme Court of the State of California, was in error in applying the state statute of limitations to petitioner's case and we respectfully ask that this court so rule, and make its proper order accordingly.

Dated, San Francisco,
October 1, 1925.

Respectfully submitted,
H. W. HUTTON,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL,
Petitioner,
vs.
J. O. DAVENPORT, et al.,
Respondents.

REPLY BRIEF FOR PETITIONER.

H. W. HUTTON,
Pacific Building, San Francisco,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

We apologize for the absence of an Index in our first brief, the absence was caused by the fact that the new rules of the court do not appear to have arrived on this side of the continent when it was printed.

Subject Index

	Page
A United States court only applies state statutes of limitations by analogy	7
Several of the cases cited by respondent have been overruled	5
The state court had jurisdiction over the subject matter	3
There is no reason for the confusion of opinions on this law	6
This case is within the terms of the Jones Act	2

Table of Authorities Cited

	Pages
Atlanza v. U. S. Shipping Board E. F. C., 299 Fed. 975	5
Same case, 3 Fed. (N. S.) 845	5
Carlisle Packing Co. v. Sandanger, 259 U. S. 255	4
Dawson v. Superior Court, 13 Cal. App. 582, 583	4
Engel v. Davenport, 194 Cal. 344	1
Faras v. Lower Cal. Dev. Co., 27 Cal. App. 688	4
Knickerbocker Ice Co. v. Stewart, 253 U. S. 159, 161	3
Lynott v. Great Lakes Trans. Co., 202 N. Y. App. Div. 613	4, 5, 6
Larson v. Alaska Packers Ass'n, 96 Wash. 665	4
Malia v. Southern Pacific Co., 293 Fed. 902	5
Manchester v. Massachusetts, 119 U. S. 240, 263	3
Nox v. U. S. Shipping Board, 193 N. Y. S. 340	6
Panama Ry. Co. v. Johnson, 264 U. S. 375	5
People v. Welsh, 141 N. Y. 266	4
Plaqumines Fruit Co. v. Anderson, 170 U. S. 511, 517	4
Prieto v. Robins Line S. S. Co., 277 Fed. 312	6
Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 123	4
Rosenberg v. Frank, 58 Cal. 387, 403	4
Tammis v. Panama Ry. Co., 202 N. Y. App. Div. 226, 234	4, 5, 6
The Hamilton, 207 U. S. 494	4
Wenzler v. Robins Line S. S. Co., 277 Fed. 312	5

Statutes Cited

	Page
Sec. 1 of Fed. Employers Liability Act	2
Sec. 33 of Jones Act	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL,
Petitioner,
vs.
J. O. DAVENPORT, et al.,
Respondents.

REPLY BRIEF FOR PETITIONER.

I.

The case on review herein is *Engel v. Davenport,* 194 Cal. 344. The Supreme Court of the State of California decided two things in that case, to-wit:

First. By what is apparently very clear reasoning, that it had jurisdiction over the subject matter of the action.

Second. It concedes, for the purpose of argument, that the two-year federal statute of limitations would apply if the action had been brought in a federal court,

but that the state statute of limitations applied because the action was brought in the state court. (Pages 350-351.) In other words, that when Congress legislates it does not legislate for all courts.

Respondent admits as follows, on page 26 of his brief:

> "And we further concede that Acts of Congress, upon those subjects, are binding on the state courts."

So the question in this case appears to be: What did Congress do? We believe we fully pointed that out in our brief, but other questions have been presented in respondents' brief, which we will take up.

II.

THIS CASE IS WITHIN THE TERMS OF THE JONES ACT.

First, we beg to state that we do not understand the reasoning of counsel for respondents, that there is a difference between unseaworthiness and negligence, as our mind is so constructed that we fail to comprehend how a vessel can be sent to sea in an unseaworthy condition and not be defective or insufficient, hence negligently sent.

The last part of Section 1 of the Federal Employers' Liability Law reads:

> "or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

It will certainly be very difficult to construe an unseaworthy vessel out of that language. But the com-

plaint herein reads (paragraph V, page 2, of Transcript):

> "* * * and the appliances on said vessel were defective in this, that there was on board of said vessel and necessary to be used in carrying said cargo of lumber, an appliance called a chain lashing upon which chain lashing there was a necessary part thereof a hook called a pelican hook, that during the times herein stated said pelican hook was defective in this, that it had a flaw therein which was observable upon ordinary inspection, but no inspection was made of said hook by defendants or any thereof, * * * the said pelican hook broke by reason of the flaw aforesaid * * *"

We submit that language brings the case within Sec. 1 of the above act.

III.

THE STATE COURT HAD JURISDICTION OVER THE SUBJECT MATTER.

It is elementary that a court of general jurisdiction has jurisdiction over all matters, unless its jurisdiction *is expressly excluded.* This court said, in

> *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 159, 161:
>
> "Also it should be noted that federal laws are constantly applied in state courts; *unless inhibited their duty* so requires. Cons. Ar. VI, Clause 2, 2nd Employers Liability cases, 223 U. S. 1, 55."

In the last mentioned case, this court held that state courts had jurisdiction over cases arising under this same act.

Manchester v. Massachusetts, 119 U. S. 240, 263.

"personal suits on maritime contracts or for maritime torts can be maintained in the state courts."

The Hamilton, 207 U. S. 404.

"leaves open the common law jurisdiction of the state courts over torts committed at sea. This we believe has always been admitted." (Cases cited.)

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 123;

Carlisle Packing Co. v. Sandanger, 259 U. S. 255;

Larson v. Alaska Packers Association, 96 Wash. 665;

Rosenberg v. Frank, 58 Cal. 387, 403;

Dawson v. Superior Court, 13 Cal. App. 582-3;

Faras v. Lower Cal. Dev. Co., 27 Id. 688;

Lynott v. Great Lakes Trans. Co., 202 N. Y. App. Div. 613;

Tammis v. Panama Ry. Co., Id. 226.

Both of the last cited cases are upon this same act, and on page 233 we find the following quotation from *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 517, in which this court said:

"If it was intended to withdraw from the states authority to determine by its (sic) courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, *such a purpose would have been manifested by clear language.*"

People v. Welch, 141 N. Y. 266.

Respondents rely entirely upon the language in Sec. 33 of the Jones Act, as follows:

"Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is situated."

That language is broad enough to cover state courts, but this court held in

Panama Ry. Co. v. Johnson, 264 U. S. 375,

that that language only applied to *venue,* thus compelling an action to be brought where the employer had his office or residence, instead of any where he might do business, as the Railway Employers' Liability Act permitted, and the Appellate Division of New York held likewise in the above cases of *Lynott v. Great Lakes Trans. Co.,* and *Tammis v. Panama Ry. Co.,* 202 Appellate Division 226, 613.

A state court can just as readily be "the court of the district" as a United States court can, and the language simply fixes the place of trial, and does not divest previously vested jurisdiction of courts.

IV.

SEVERAL OF THE CASES CITED BY RESPONDENT HAVE BEEN OVERRULED.

Malia v. Southern Pacific Co., 293 Fed. 902, and *Atianza v. United States Shipping Board,* E. F. C., 299 Fed. 975, both decided by Judge Garvin were overruled by him in *Atianza v. United States Shipping Board,* E. F. C., 3 Fed. (N. S.) 845. And he therein disagrees with *Wenzler v. Robins Line S. S. Co.,* 277 Fed. 812, therein, as had Judge Hand previously.

The latter case and *Prieto v. U. S. Shipping Board,* 193 N. Y. S. 342, page 27 of Respondents' Brief, and *Nox v. United Shipping Board,* 193 N. Y. S. 340, cited on page 29 of said brief, are each disagreed with in *Lynott v. Great Lakes Transit Co.,* 202 N. Y. App. Div. 619-620. And the *Nox* and *Prieto* cases, in *Tammis v. Panama Ry. Co.,* 202 N. Y. App. Div. 234.

V.

THERE IS NO REASON FOR THE CONFUSION OF OPINIONS ON THIS LAW.

What Congress intended is clear, that is, place seamen just where railway employers were, and are, and the words "all statutes of the United States" are as this court said in the *Panama Railway Co. v. Johnson* case words of reference, the words could not be more comprehensive, or easier to understand. As we said in our opening brief most of the confusion arises from the *Wenzler Robins Line S. S. Co.* case, and we respectfully submit that the court in that case failed to give any effect to the above words "all statutes," when effect should have been given to those words with the rest of the language. If Congress had not intended "all statutes " it would have used the language, "all those parts of all statutes".

VI.

A UNITED STATES COURT ONLY APPLIES STATE STATUTES OF LIMITATION BY ANALOGY.

That is, if there is a federal statute it applies that, in the absence of congressional legislation analogy is used, but never where there is a United States statute, as if there is a federal statute, it is impossible to apply the doctrine of analogy and the law of the forum cannot apply when Congress has legislated on the subject.

We respectfully submit that all the best reasoning on Section 33 is with our contention and it is detrimental to everyone interested in shipping matters for the present confusion of decisions to remain, and that judgment should go accordingly.

Dated, San Francisco,
January 16, 1926.

Respectfully submitted,
H. W. HUTTON,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL,
Petitioner,
vs.
J. O. DAVENPORT, et al.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, J. O. DAVENPORT.

EDWARD J. McCUTCHEN,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Balfour Building, San Francisco,
Attorneys for Respondent.

Parker Printing Company, 523 Clay Street, San Francisco

Table of Contents

	Page
STATEMENT OF THE CASE	1
THE ARGUMENT	2
I. The alleged cause of action is barred by the one year California statute of limitations for suits for personal injuries—section 340, subdivision 3, of the California Code of Civil Procedure	4
A. This statute is the controlling law of the forum	4
B. Assuming that the Merchant Marine Act is applicable to this case, the state statute of limitations still governs; the Jones Act not having incorporated the limitation provisions of the Federal Railway Act	5
1. Congress in enacting section 33 of the Merchant Marine Act of 1920 merely changed, at the election of the seaman, the substantive law relating to negligence with the right of trial by jury, and did not adopt or purport to adopt for such cases the two year statute of the Federal Employers' Liability Act	7
2. There was plainly no intention on the part of Congress to adopt the Railway Employers' Liability Act in entirety for seamen's personal injury cases, but merely the provisions defining the nature of and defenses to the right of action thus newly conferred upon seamen	11
3. Only those parts of the statutes of the United States "modifying or extending the common law right or remedy in cases of personal injury to railway employees" are made applicable to seamen's cases under section 33 of the Merchant Marine Act of 1920. Well settled principles of statutory construction confirm this	17

Page

4. A limitation statute is not a common-law right or remedy 18

5. The argument that the application of state statutes of limitations would interfere with the uniformity of the maritime law is unsound; the rule of uniformity having to do with substantive rights solely, not mere procedural matters 20

C. A seaman has a right to sue in a state court for injuries suffered by reason of the unseaworthiness of a vessel or defect in her appliances without reference to section 33 of the Merchant Marine Act of 1920; this is really such a suit and the one year California statute of limitations undeniably applies to it 21

II. The Superior Court of the State of California had no jurisdiction of the alleged cause of action under section 33 of the Merchant Marine Act of 1920 26

APPENDIX i

Table of Authorities Cited

	Pages
American Steamboat Company v. Philip B. Chase, etc., 16 Wall. 522, 21 L. Ed. 369	11, 23
Atianza v. United States Shipping Board Emergency Fleet Corporation, 299 Fed. 975	14
Barrington v. Pacific Steamship Co., 282 Fed. 900	27
Bauserman v. Blunt, 147 U. S. 647, 37 L. Ed. 316, 13 Sup. Ct. 466	24
Bonam v. Southern Menhaden Corporation, 284 Fed. 362	23
Brazil v. Matson Navigation Co., 1923 A. M. C., Vol. 1, No. 5, p. 392	23
Buckley v. Oceanic S. S. Co., 5 F. (2d) 545	23
Caceres v. United States Shipping Board Emergency Fleet Corporation, 229 Fed. 968	14
Campbell v. Haverhill, 155 U. S. 610	24
Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927, 42 Sup. Ct. 475	22
Chaflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833	26, 30
Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 501	8, 9, 22
Corpus Juris, Vol. I, 1329	21
Cowhick v. Shingle, 5 Wyo. 87, 37 Pac. 689	18
Cricket S. S. Co. v. Parry, 263 Fed. 523	23
Cyc. (36), p. 1152	17
Davis, et al. v. Smokeless Fuel Co., 182 Fed. 1004, 196 Fed. 753	21, 23
Engel v. Davenport, 194 Cal. 344, 228 Pac. 710	2
Fullerton, The, 167 Fed. 1	23
Jones v. Dexter, 8 Fla. 276	17
Judicial Code, Section 28	14
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 L. Ed. 834, 40 Sup. Ct. 438	8

	Pages
Lorang v. Alaska S. S. Co., 298 Fed. 547	14, 29
Lynott v. Great Lakes Transit Corporation, 195 N. Y. S. 13	27
McGrath v. Panama R. Co., 298 Fed. 303	23
Malia v. Southern Pac. Co., 293 Fed. 902	14
Michigan Insurance Bank v. Eldred, 130 U. S. 693, 32 L. Ed. 1080, 9 Sup. Ct. 690	24
Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, at p. 57, 56 L. Ed. 327, 32 Sup. Ct. 169	26
Munos v. Southern Pac. Co., 51 Fed. 188, 190	4
Nesbit v. The Amboy, 36 Fed. 925	23
Nox v. United States Shipping Board Emergency Fleet Corporation, 193 N. Y. S. 340	29
Osceola, The, 189 U. S. 158, 47 L. Ed. 760, 23 Sup. Ct. 483	8, 22
O'Sullivan, E. A., v. Paul Felix and William W. Stiles, 233 U. S. 318, 58 L. Ed. 980, 34 Sup. Ct. 596	24
Panama Railroad Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 748, 44 Sup. Ct. 391	11, 17, 22, 29, 30
Petterson v. Hobbs-Wall & Co., 300 Fed. 811; aff'd 2 F. (2d) 594	15
Platt v. Wilmot, 193 U. S. 602, 48 L. Ed. 809, 24 Sup. Ct. 542	4
Prieto v. United States Shipping Board Emergency Fleet Corporation, 193 N. Y. S. 342	27
Rex v. Surrey, 2 T. R. 504, 100 Eng. Rep. R. 271	17
Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139	4, 24
Smith v. Mitchell, Rice's Law 316 (S. C.) 33 Am. Dec. 119	18
State v. Marion County, 170 Ind. 595, 85 N. E. 513	17
Story on Conflict of Laws, Section 577	4
Wall v. Robson, 2 Nott & McCord, 498 (S. C.) 10 Am. Dec. 623	18
Wenzler v. Robin Line S. S. Co., 277 Fed. 812	15, 18, 27
Wharton on Conflict of Laws, 3d Ed., Vol. 2, p. 1245	4
Wood on Limitations, 4th Ed., p. 4	18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL,
Petitioner,
vs.
J. O. DAVENPORT, et al.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, J. O. DAVENPORT.

STATEMENT OF THE CASE.

This is a suit by a seaman to recover damages for personal injuries suffered by reason of the alleged unseaworthiness of the appliances of the steamship "Davenport". The injury is alleged to have occurred on April 30, 1921. On January 18, 1923, the complaint was filed in the Superior Court of the State of California, in and for the City and County of San Francisco. J. O. Davenport, respondent herein, and one of the co-owners of the

vessel named as defendants, demurred to the complaint upon the ground that the alleged cause of action was barred by the California statute of limitations, section 340, subdivision 3, of the Code of Civil Procedure, which requires actions for personal injuries to be commenced within one year. The demurrer was also general, the contention being that the court was without jurisdiction of the subject-matter, if, as petitioner claimed, the cause of action was based on section 33 of the Merchant Marine Act of 1920 (41 Stats. at L. 988, 1007).

The Superior Court sustained the demurrer. Petitioner did not ask for leave to amend the complaint, but took an appeal to the Supreme Court of the State of California. The latter court affirmed the judgment.

67 *Cal. Dec.* 325.

A petition for rehearing was filed and granted. Thereafter the Supreme Court of the State handed down another opinion affirming the judgment.

Engel v. Davenport, 194 Cal. 344, 228 Pac. 710.

Petitioner then applied to this court for a writ of certiorari, which was granted. The case is now before this court on the merits.

THE ARGUMENT.

The Supreme Court of the State of California held that the alleged cause of action was barred by the provisions of section 340, subdivision 3, of the California Code of

Civil Procedure. Our claim is that the bar of this statute applies equally, whether the complaint affects to state a cause of action under section 33 of the Merchant Marine Act of 1920 (as petitioner maintains) or under the maritime law apart from that statute (as we think).

As we understand the petitioner, he does not claim that the bar of the California statute would not apply if the cause of action is based upon the old rules of the maritime law. Upon that point the law is so well-settled that there can be no argument. His contention is that his action is stated under the Jones Act, (section 33 of the Merchant Marine Act of 1920) and that such action is not subject to the one year limitation of the California statute, but to a two year Federal statute of limitations. He relies on section 6 of the Railway Employers' Liability Act of 1908 (35 Stats. at L. 65), as amended by the Act of April 5, 1910 (36 Stats. at L. 291), which provides, *inter alia* that no action shall be maintained unless commenced within two years from the day the cause of action accrued.

If our position is sound, as we believe we can demonstrate it to be, that the one year bar applies in either situation, the demurrer to the complaint was properly sustained. We, therefore, argue this point first.

If the Court is not disposed to hold with us upon the point, we submit that nevertheless the demurrer was properly sustained because the Superior Court of the State of California is without jurisdiction of an action brought under section 33 of the Merchant Marine Act of 1920.

I.

THE ALLEGED CAUSE OF ACTION IS BARRED BY THE ONE YEAR CALIFORNIA STATUTE OF LIMITATIONS FOR SUITS FOR PERSONAL INJURIES—SECTION 340, SUBDIVISION 3, OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

A. This Statute is the Controlling Law of the Forum.

The injury alleged in the complaint occurred on April 30, 1921. The complaint was filed on January 18, 1923 (Record p. 1), and thus more than one year after the injury. The alleged cause of action is, therefore, barred by the provisions of section 340, subdivision 3, of the California Code of Civil Procedure. That section requires a suit for personal injuries to be filed within one year.

The cause then is one for the application of the universal rule that the law of the forum controls with reference to the time in which a suit must be filed.

In

Munos v. Southern Pac. Co., 51 Fed. 188, 190,

the court said:

> "Laws limiting the time of bringing suits constitute a part of the *lex fori* of every country; they are laws of administering justice, one of the most sacred of rights."

See, also,

Platt v. Wilmot, 193 U. S. 602, 48 L. Ed. 809, 24 Sup. Ct. 542;

Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139;

Wharton on the Conflict of Laws, 3d Ed., Vol. 2, p. 1245;

Story on Conflict of Laws, Sec. 577.

Here the law of the forum is section 340, subdivision 3, of the California Code of Civil Procedure, and because of its terms the alleged cause of action set forth in the complaint is barred.

B. Assuming that the Merchant Marine Act Is Applicable to This Case, the State Statute of Limitations Still Governs; the Jones Act Not Having Incorporated the Limitation Provision of the Federal Railway Act.

The petitioner, however, contends that the California Code is inapplicable because of the provisions of section 6 of the Railway Employers' Liability Act of 1908 (35 Stats. at L. 65, chap. 149), as amended by the Act of April 5, 1910 (36 Stats. at L. 291, chap. 143).

The first paragraph of section 6 of the Railway Employers' Liability Act provides that suits by railway employees engaged in interstate commerce against their employers shall be commenced within two years after the accrual of the cause of action. Attempting to apply the two year limitation of that section, petitioner urges that the present suit is not barred because it was filed within two years after the alleged cause of action accrued.

That section does not by its terms apply to seamen, but petitioner contends that it is applicable to his alleged cause of action by reason of the provisions of section 33 of the Merchant Marine Act of 1920 (41 Stats. at L. 988).

Petitioner's line of thought seems to be this: Section 33 of the Merchant Marine Act of 1920 applies to the cause of action set out in the complaint. The statute purports to provide *inter alia* that seamen may recover dam-

ages for personal injuries resulting from negligence of their employers. (Previously they could have damages only for unseaworthiness of the vessel or defect in her appliances.) The same section of the Merchant Marine Act further provides that in such actions for damages all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees, shall apply. Therefore, every section of every statute of the United States relative to suits by railway employees for personal injuries shall be imported into the maritime law applicable to suits by seamen for personal injuries—including, with special reference to the present case, statutes of limitation and, here, section 6 of the Federal Railway Employers' Liability Act.

Petitioner also argues that to allow state statutes of limitations to apply to causes of action under the Jones Act does violence to the uniformity of the maritime law.

We believe that section 33 of the Merchant Marine Act is inapplicable to cases of injury resulting from unseaworthiness and that the cause of action stated in the complaint is governed exclusively by the general maritime law apart from statute. But even on the assumption that the Jones Act does apply to this case, we think petitioner's argument is untenable. Our answers to his contentions are:

1. That Congress in enacting section 33 of the Merchant Marine Act of 1920 merely changed, at the election of a seaman, the substantive law relating to negligence with the right of trial by jury, and did not adopt or purport to adopt for such cases the two year statute of limitations of the Federal Employers' Liability Act.

2. That there was plainly no intention on the part of Congress to adopt the Railway Employers' Liability Act in entirety for seamen's personal injury cases but merely the provisions defining the nature of and defenses to the right of action thus newly conferred upon seamen.

3. That only those parts of the statutes of the United States "modifying or extending the common-law right or remedy in cases of personal injury to railway employees" are made applicable to seamen's cases under section 33 of the Merchant Marine Act of 1920. Well-settled principles of statutory construction confirm this.

4. That a limitation statute is not a common-law right or remedy.

5. That the argument that the application of state statutes of limitations would interfere with the uniformity of the maritime law is unsound; the rule of uniformity having to do with substantive rights solely, not mere procedural matters.

1. Congress in enacting section 33 of the Merchant Marine Act of 1920 merely changed, at the election of the seaman, the substantive law relating to negligence with the right of trial by jury, and did not adopt or purport to adopt for such cases the two year statute of the Federal Employers' Liability Act.

There is not any language in section 33 making or purporting to make section 6 of the Liability Act applicable to seamen's cases. The latter section deals with questions of procedure only. As to this the situation under the existing laws was not prejudicial to seamen. They were

in the same position as shore employees. The time within which seamen might sue for damages in case of personal injury was adequately covered by existing law. There was in this regard no evil to remove, no prejudice of position to relieve.

But in another regard there was a supposed evil designed to be corrected by the legislation; and when we give attention to this feature of the situation as we should,* the purpose and meaning of section 33 of the Merchant Marine Act become manifest.

Prior to the enactment of section 20 of the Seamen's Act of March 4, 1915, seamen, whether injured with or without negligence, were entitled to wages until the end of the voyage upon which they shipped, and maintenance and cure for a reasonable period of time thereafter. They were entitled to indemnity or damages only if their injuries resulted from unseaworthiness of the vessel or her appliances; or if the master failed to render them medical attention.

The Osceola, 189 U. S. 158; 47 L. Ed. 760, 23 Sup. Ct. 483;

Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 501.

Congress, believing apparently that there was not any liability in cases of injury to seamen not resulting from

---

*The purpose of a statute is always a proper subject of inquiry in such cases because it usually paves the way to the true meaning of the statute. *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, 64 L. Ed. 834, 40 Sup. Ct. 438.

unseaworthiness, because of the fellow-servant rule, enacted section 20 of the Seamen's Act of 1915. It provided:

> "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."
>
> 38 *Stats. at L.*, pp. 1164, 1185.

By this latter section Congress attempted to impose a liability upon shipowners in those cases where the injuries to seamen resulted from the negligence of a seaman in command—a fellow-servant. But, said this court, section 20 of that Act is irrevelant because negligence is immaterial in considering a shipowner's liability in such cases.

Chelentis v. Luckenbach Steamship Co., supra.

So the general maritime law still prevailed.

To meet the last mentioned decision of this court, Congress on June 5, 1920, amended section 20 of the Seamen's Act to read as it now appears in section 33 of the Merchant Marine Act of 1920. That section provides:

> "Section 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> 'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such

> seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' "
>
> 41 *Stats. at L.*, pp. 988-1007, chap. 250.

It will be seen that Congress was here conferring upon seamen, at their election, a right of action, which they had not before enjoyed, for damages for personal injuries and was defining that right by reference to the right of action enjoyed by railway employees under the Railway Employers' Liability Act. By reference to the text of that Act (which we print for convenience of reference in the appendix), it will be noted that the rule of *respondeat superior* is made applicable with substantial elimination of the old common-law defenses of the fellow-servant doctrine, assumption of risk, and contributory negligence.

Congress, by section 33 of the Merchant Marine Act of 1920, gave, and plainly meant to give, seamen the right, at their election, of having their causes of action determined by the same principles. So, without re-enacting a separate and necessarily somewhat lengthy statute, it incorporated by reference the statutes of the United States applicable to railway employees which made the rule of *respondeat superior* controlling.

Congress did not provide that any other statute of the United States, or any section of any statute of the United States, which accomplished any other purpose, should be

applicable to seamen's cases under section 33 of the Merchant Marine Act of 1920. Only substantive law in cases of injury resulting from negligence* is dealt with by Congress in that statute.

In view of the plain language of the statute and its history, it is impossible, we respectfully submit, to read into section 33 of the Merchant Marine Act of 1920 any purpose or intention to amend, change or regulate the procedure of the forum where the right is asserted. When the right is asserted, the injured seaman, at his election, may sue in admiralty or on the common-law side of the court. The practice and procedure of each court are different.

Panama Railroad Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 748, 44 Sup. Ct. 391;

American Steamboat Company v. Philip B. Chase, etc., 16 Wall. 522, 21 L. Ed. 369.

2. There was plainly no intention on the part of Congress to adopt the Railway Employers' Liability Act in entirety for seamen's personal injury cases, but merely the provisions defining the nature of and defenses to the right of action thus newly conferred upon seamen.

Section 33 of the Merchant Marine Act provides that all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply to cases of injury to seamen.

---

*As hereinafter pointed out, Section 33 is, we think, inapplicable to cases of injury resulting from unseaworthiness. (pp. 21-25, infra.)

Manifestly that language does not mean that every statute of the United States applicable to railway employees is applicable to such cases. If it did, the Safety Appliance Act of March 2, 1903 (32 Stats. at L. 943, chap. 976), the Boiler Inspection Act of February 17, 1911 (36 Stats. at L. 913, chap. 103), the Hours of Service Act of March 4, 1907 (34 Stats. at L. 1415, chap. 2939), and numerous other statutes and their amendments, with their many provisions inapplicable to vessels and the merchant marine, would necessarily be applicable. If Congress had any such thought in mind it would have said "all statutes of the United States applicable to railway employees" shall be applied. Instead it said:

> "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

It is likewise clear that all of the provisions or sections of the Federal Railway Employers' Liability Act were not made applicable to seamen's cases by section 33 of the Merchant Marine Act. The language of some of the sections shows them to be inapplicable. See, for instance, section 2 (common carriers in the territories, District of Columbia) section 5 (employer's set off of insurance contributions, etc.), section 6 (limitation, venue, concurrent jurisdiction of state courts), section 7 ("common carrier" includes receiver, etc.), and section 8 (saving clause with respect to other Acts, etc.).

It is section 6 of the Act, however, which chiefly concerns us here. That section reads:

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It will be seen that the above section deals with three procedural matters with respect to railway employees' suits, limitation, venue and removal. We think it clear that none of these provisions were incorporated into the maritime law by the Merchant Marine Act.

If Congress intended to make section 6 applicable to suits brought under section 33 of the Merchant Marine Act of 1920, why was any reference made in the latter section to the court where the right should be enforced? That subject was expressly covered by section 6 of the Railway Employers' Liability Act. Under section 6 suits may be filed

"in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

Whereas in suits filed under the provisions of section 33 of the Merchant Marine Act of 1920:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which the principal office is located."

If Congress desired or intended to make section 6 of the Railway Act applicable to cases brought under the Seamen's Act, it would not have uselessly covered the same subject by an additional provision. The latter provision would have been unnecessary. This would be true, even if the provisions of both sections were identical. But, where, as here, they are not alike, but, on the contrary, different from one another, it is clear that the provisions of both sections cannot be applied. It necessarily follows that the provisions of section 33 must control and it likewise becomes manifest that section 6 was not made applicable to seamen's cases.

Section 6 of the Railway Act also provides that no case arising under the Act and brought in any state court may be removed to any court of the United States. Yet suits based upon section 33 of the Merchant Marine Act of 1920 have been removed to and clearly are removable to the Federal court.

Section 28 of the *Judicial Code;*
Malia v. Southern Pac. Co., 293 Fed. 902;
Lorang v. Alaska S. S. Co., 298 Fed. 547;
Caceres v. United States Shipping Board Emergency Fleet Corporation, 299 Fed. 968;
Atianza v. United States Shipping Board Emergency Fleet Corporation, 299 Fed. 975;

Petterson v. Hobbs, Wall & Co., 300 Fed. 811; aff'd 2 F. (2d) 594;

Wenzler v. Robin Line S. S. Co., 277 Fed. 812.

The case last cited, to which we invite special attention, contains a learned and comprehensive discussion of the portions of the Railway Employers' Liability Act which were intended to be made applicable to seamen's cases. Said the court in that case:

> "If the removal statute be in any sense a remedy, as distinguished from a right, it is then the remedy of defendant. But Section 20, in speaking of rights and remedies, is not referring to those of the defendant, but to the rights and remedies of the plaintiff at common law. Upon reading the expression 'modifying or extending the common-law right or remedy in cases of personal injury to railway employees', there is no escape from the impression that the dominant thought in the mind of Congress was a modifying or extending, in certain particulars, of the common-law right or remedy 'cases of personal injury'.
>
> The sections above noted from the Employers' Liability Act regarding assumption of risk and contracts by carriers to exempt themselves from liability constitute modifications of common-law rights or remedies peculiarly appropriate to personal injury cases. But the statute of removal has no more to do with personal injury cases than any other case. The adding to the expression, 'modifying or extending the common-law right or remedy in cases of personal injury', of the further words, 'to railway employees', was rendered necessary by reason of the fact that the desired modification of the common-law rights and remedies for personal injuries was particular or peculiar to railway employees, in that Congress had extended to them alone the advantages of such modification, which benefits it was Congress' desire to

> also confer upon seamen. Hence the reference to railway employees is made to distinguish and point out the law referred to rather than describe or define its scope or nature, or give to the words 'modifying or extending the common-law right or remedy in case of personal injury' any other than the ordinary meaning.
>
> That portion of section 8662 and section 28 denying removal does not modify the common law in cases of personal injuries. It modifies the statute law of removal. To hold that Congress intended to incorporate this provision, it is necessary to find that the statute on removal is a part of a common-law right in case of personal injury. The statute of removal of causes is no part of the common law. It cannot even be said to be either a modification of extension of a common-law right or remedy. It is merely the machinery for getting the case into the right court."

We recognize that there are some decisions, chiefly of the New York district courts, holding to the contrary, but we believe them to be unsound, and submit that there is no answer to the reasoning of the cases cited above, especially to the quotation from Judge Cushman's opinion in the *Wenzler* case.

There is, of course, no more reason for contending that the limitation provision of section 6 was incorporated into the Jones Act than for claiming that the venue and removal provisions were.

3. Only those parts of the statutes of the United States "modifying or extending the common-law right or remedy in cases of personal injury to railway employees" are made applicable to seamen's cases under section 33 of the Merchant Marine Act of 1920. Well settled principles of statutory construction confirm this.

It is to be noted that section 33 of the Merchant Marine Act does not refer to or purport to incorporate or adopt any particular statute of the United States. The Railway Employers' Liability Act of 1908 is not specifically mentioned. In these circumstances and according to well-settled principles of statutory construction only those parts of statutes of the United States which

> "particularly relate to the subject of the adopting statute will be considered as incorporated in the latter in the absence of a clear intention to adopt the whole Act."
>
> 36 *Cyc.* 1152;
>
> *Rex v. Surrey,* 2 T. R. 504; 100 Eng. Rep. R. 271;
>
> *Jones v. Dexter,* 8 Fla. 276;
>
> *State v. Marion County,* 170 Ind. 595; 85 N. E. 513.

Here, of course, the subject of the adopting statute was the modification and extension of the common-law rights and remedies. Thus those portions of the statutes of the United States applicable to railway employees, which modified or extended common-law rights and remedies, *and only those,* were incorporated in or adopted by section 33 of the Merchant Marine Act of 1920. And that is what this court held in

> *Panama Railroad Co. v. Johnson,* 264 U. S. 375; 68 L. Ed. 748, 44 Sup. Ct. 391,

where the court, in commenting on the statutes' adoption of the Railway Employers' Liability Act, said:

> "This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter *all that is fairly covered by the reference.*" (Italics ours.)

And thus we come logically to the point that

4. A limitation statute is not a common-law right or remedy.

The reasoning of the excerpt quoted above from

Wenzler v. Robin Line S. S. Co., 277 Fed. 812,

applies. The California one year statute of limitations for personal injury actions (Code of Civil Procedure, section 340, subdivision 3), which we submit is the controlling law of the forum, is not a common-law right or remedy and is therefore not supplanted by section 6 of the Railway Employers' Liability Act. The California code provision is a creature of the legislature and was unknown to the common law.

Wall v. Robson, 2 Nott & McCord, 498 (S. C.); 10 Am. Dec. 623;

Smith v. Mitchell, Rice's Law 316 (S. C.); 33 Am. Dec. 119;

Cowhick v. Shingle, 5 Wyo. 87; 37 Pac. 689;

Wood on Limitations, 4th Ed., p. 4.

Hence the application of the California code provision is not affected by the language of section 33 of the Merchant Marine Act of 1920, adopting statutes of the United States "modifying or extending the common-law right or

remedy in cases of personal injury to railway employees". Congress in adopting section 33 of the Merchant Marine Act was not, as we have pointed out, altering or attempting to alter, the procedure of the forum but to correct a supposed defect in the substantive law. The procedure which was not touched includes, of course, the limitation statute of the state where the suit, based upon section 33 of the Merchant Marine Act, may be filed.

We frankly do not follow petitioner's argument (petitioner's brief, pp. 6-8) that these words "modifying or extending the common-law right or remedy" are "words of reference" and not "of limitation", and that therefore all parts of every statute dealing with personal injury to railway employees shall apply. This court has already held that the reference is to the Federal Railway Act and that only the portions of it "fairly covered by the reference" are incorporated. We have shown that some parts of the Act from their very nature could not possibly be adopted. Petitioner argues that "every word of a statute must be given effect if possible" (petitioner's brief, p. 7) and then proceeds to give no effect to the words "modifying or extending the common-law right or remedy" by contending that these words are not to be given their natural meaning but are to be interpreted as being descriptive of the *whole* of a statute, all of which could not by any stretch of language be said to modify or extend the common-law right or remedy.

5. The argument that the application of state statutes of limitations would interfere with the uniformity of the maritime law is unsound; the rule of uniformity having to do with substantive rights solely, not mere procedural matters.

Nor is there any merit in petitioner's contention (petitioner's brief, p. 10) that the application of the state statute of limitations is contrary to the well-defined doctrine concerning the necessity of uniformity in maritime matters. The policy of uniformity pertains only to matters of substance and is foreign to procedural questions. In the nature of things it would be impossible, or almost impossible, to make the rules of procedure uniform as applied to suits instituted by seamen. There never has been any uniformity in this respect. Long before the Merchant Marine Act of 1920 was passed, seamen could, and frequently did, sue in a court of law, although their rights were governed by the maritime law. When a seaman did choose to sue in a law court, he was invariably limited by the law of the forum as to the time of bringing suit. The statutes of limitations governing personal injuries vary widely in the states of the union; consequently there was not and could not be any uniformity in this respect prior to the Merchant Marine Act of 1920. Exactly the same situation exists now as was the case before that statute was passed.

Furthermore, there is not and never has been any uniformity in courts of admiralty with respect to the time within which a seaman may bring suit. When there has been an unreasonable delay, laches may be set up as a

defense by respondent, and it is within the discretion of the court, depending on the circumstances, whether the defense will be allowed. Where there are no extraordinary circumstances a court of admiralty will follow the state statute of limitations in all classes of actions.

1 *C. J.*, 1329.

This cannot be deemed to destroy uniformity. The reason for this well-settled rule is admirably set forth in

Davis et al. v. Smokeless Fuel Co., 182 Fed. 1004:

> "The only reason why statutes of limitation are regarded in the admiralty at all is that they furnish a convenient measure of staleness. They represent, or ought to represent, the settled opinion of the community, as to when there should be an end of litigation, * * *."

It is apparent from the foregoing that there is not now nor has there ever been any uniformity with respect to the time of commencement of actions in the state courts, in the law side of the federal courts, or in courts of admiralty.

C. A Seaman Has a Right to Sue In a State Court for Injuries Suffered By Reason of the Unseaworthiness of a Vessel Or Defect in Her Appliances Without Reference to Section 33 of the Merchant Marine Act of 1920; This Is Really Such a Suit and the One Year California Statute of Limitations Undeniably Applies To It.

Thus far we have assumed that the Jones Act is applicable to the cause of action stated in petitioner's complaint. As a matter of fact, however, we think that statute was not intended to and does not cover a case such

as this, and that petitioner's rights depend solely upon the general law as it existed prior to the statute.

Section 33 of the Merchant Marine Act of 1920 does not change or purport to change or abolish the pre-existing maritime law. It merely gives a seaman an election to maintain an action at law or in the admiralty when he has been injured by negligence. Under the maritime law, and despite the provisions of the aforesaid section 33, a seaman may still file a suit in admiralty or in the state or federal court at law to recover indemnity where he is injured by reason of the unseaworthiness of the vessel or her appliances.

The Osceola, supra;

Chelentis v. Luckenbach Steamship Co., supra;

Carlisle Packing Co. v. Sandanger, 259 U. S. 255; 66 L. Ed. 927, 42 Sup. Ct. 475;

Panama Railroad Co. v. Johnson, supra.

In the latter case this court said:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new laws, drawn from another system, and extend to injured seamen a right to invoke, at their election, *either the relief accorded by the old rules, or that provided by the new rules.*"

In a case brought at the election of the seaman under the old rules, a seaman to recover damages merely has to establish unseaworthiness or defective appliances. Common-law defenses in such cases are not open to a shipowner. The benefit of any statute of the United

States modifying or extending common-law rights and remedies in such cases is unnecessary.

Cricket S. S. Co. v. Parry, 263 Fed. 523;
The Fullerton, 167 Fed. 1.

Section 33 of the Merchant Marine Act of 1920 did not give to or confer upon seamen, injured by reason of unseaworthiness of the vessel or her appliances, any greater rights or remedies than they had or now have under the existing maritime law. This fact emphasizes what we have previously said about section 33 being applicable only to cases of personal injury resulting from negligence (*respondeat superior*) as distinguished from unseaworthiness of the vessel or her appliances.

As stated, a suit for personal injuries based upon unseaworthiness may be filed in a state or Federal court. If the suit is filed in a court of admiralty, the state statute of limitations governs.

Nesbit v. The Amboy, 36 Fed. 925;
Davis v. Smokeless Fuel Co., 196 Fed. 753;
McGrath v. Panama R. Co., 298 Fed. 303;
Brazil v. Matson Navigation Co., 1923 A. M. C. Vol. 1, No. 5, p. 392.

If the suit is filed on the law side of the Federal court, the state statute of limitations is mandatory.

Bonam v. Southern Menhaden Corporation, 284 Fed. 362;
Buckley v. Oceanic S. S. Co., 5 F. (2d) 545;
American Steamboat Company v. Philip B. Chase, 16 Wall. 522; 21 L. Ed. 369;

Michigan Insurance Bank v. Eldred, 130 U. S. 693; 32 L. Ed. 1080, 9 Sup. Ct. 690;

Bauserman v. Blunt, 147 U. S. 647; 37 L. Ed. 316, 13 Sup. Ct. 466;

Campbell v. Haverhill, 155 U. S. 610; 39 L. Ed. 280, 15 Sup. Ct. 217;

E. A. O'Sullivan v. Paul Felix and William W. Stiles, 233 U. S. 318; 58 L. Ed. 980, 34 Sup. Ct. 596.

If the limitation statute of the state governs in the Federal court, it obviously must apply in the courts of the state.

Royal Trust Co. v. MacBean, 168 Cal. 642; 144 Pac. 139.

If, therefore, the present complaint states or purports to state a cause of action under the old rules of the maritime law—that is, because of the unseaworthiness of the vessel or her appliances, it is barred by section 340, subdivision 3, of the Code of Civil Procedure.

A reference to Paragraph V of the complaint, (Record, pp. 2 and 3), shows that the alleged cause of action is based upon the alleged unseaworthiness of the vessel and her appliances. It is therein alleged:

> "That said vessel left said San Francisco on said voyage on or about the 20th day of April, 1921, at which time she was unseaworthy and so continued up to the time plaintiff was injured as hereinafter stated, and the appliances on said vessel were defective in this, that there was on board of said vessel and necessary to be used thereon in carrying said cargo of lumber, an appliance called a chain lashing upon

which chain lashing there was a necessary part thereof a hook called a pelican hook, that during the times herein stated said pelican hook was defective in this, that it had a flaw therein which was observable upon ordinary inspection, but no inspection was made of said hook by defendants or any thereof, and on said 30th day of April, 1921, at said Hoquiam, while plaintiff was as such sailor aforesaid assisting in placing said chain lashing around the upper part of said cargo of lumber on said vessel, the said pelican hook broke by reason of the flaw aforesaid which caused the said chain lashing to spring back and strike the plaintiff's skull and fractured his said skull."

The Supreme Court of the State of California in this case on this point said:

"The present action is based, not upon negligence, but upon the alleged unseaworthiness of the vessel 'Davenport', by reason of a defective pelican hook, and there can be no question but that the State Courts, prior to the enactment of the Merchant Marine Act did have and did exercise jurisdiction in such cases."

194 Cal. 344, 350; 228 Pac. 710, 712.

Thus it seems to us, as we suggested at the outset, and as the Supreme Court of the State of California held, that the present complaint, although pending in the state court, is based upon the old rules of the general maritime law, as to which the state statute of limitations is applicable, and hence it follows that the alleged cause of action is barred by section 340, subdivision 3, of the California Code of Civil Procedure.

II.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA HAD NO JURISDICTION OF THE ALLEGED CAUSE OF ACTION UNDER SECTION 33 OF THE MERCHANT MARINE ACT OF 1920.

We concede that Congress has paramount power to legislate concerning the substantive law* applicable to cases within subject matters vested in it by the Constitution. Such subjects, among others, are interstate commerce and the maritime law. And we further concede that Acts of Congress, upon those subjects, are binding on the state courts. If, therefore, Congress passes an Act within its constitutional powers, suits based upon it may be filed in the state court, unless the Act vests jurisdiction of suits under it in the Federal court exclusively either by express language, *or by implication.*

Upon this subject this court said:

> "* * * where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal Court exclusive jurisdiction. * * * *This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.*" (Italics ours.)
>
> *Chaflin v. Houseman,* 93 U. S. 130; 23 L. Ed. 833.

Our contention here is that Congress plainly indicated an intention to vest jurisdiction of cases, arising under section 33 of the Merchant Marine Act of 1920, *exclusively in the District Court of the United States.*

---

*The limitation upon the power of Congress to deal with the procedure of the courts of the states was expressly recognized by this Court in *Mondou v. New York N. H. & H. R. Co.*, 223 U. S. 1, at p. 57, 56 L. Ed. 327, 32 Sup. Ct. 169.

Congress said in the Act:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

As stated in

Barrington v. Pacific Steamship Co., 282 Fed. 900,

> "the court authorized to entertain jurisdiction of the cause is one specially designated."

The question is, which court is so "specially designated"? Most of the reported cases upon the subject hold that the words——

> "the court of the district"

mean the District Court of the United States.

In

Prieto v. United States Shipping Board Emergency Fleet Corporation, 193 N. Y. S., 342,*

the court said:

> "The words 'the court of the district' are apt to designate a District Court of the United States, but are insufficiently descriptive to be regarded as referring to state courts."

In

Wenzler v. Robin Line S. S. Co., 277 Fed. 812,

the court said:

> "In using the words 'shall be under the court of the district,' etc., Congress doubtless, had mainly in mind the continental United States, comprising the several states. The territory included in a single jurisdiction of a state court may be called a 'district';

*Overruled by *Lynott v. Great Lakes Transit Corporation*, 195 N. Y. S. 13.

but it is not always so designated. It will be noted that the expression is 'court of the district'; the word 'court,' and not 'courts,' is used—that is, the singular and not the plural.

In all of the states, the districts in which courts of the United States sit geographically include or cover the same territory that is covered by the courts of the several states in their exercise of general jurisdiction. If it had been intended by this act alone to confer jurisdiction on the United States District Court, and expressly recognize, at the same time, that of the courts of general jurisdiction of the state in which such district court was held, the word used would not have been 'court,' but doubtless would have been 'courts,' and it would not have been limited to districts, but language would have been used similar to that of subsection J of section 30, already appearing in the act before the above-quoted language of section 33, amending section 20 of the La Follette Act. The language of subsection J inter alia, is:

> '(c) * * * The District Courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several states, territories, districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. * * *' 41 Stat., p. 1003.

* * * * * * * *

Section 20 of the La Follette Act, as amended (section 33 of the Jones Act) provides that any seaman may, at his election, maintain an action for damages at law; that is, he does not have to sue in the admiralty, but may sue at law in the District Court. If Congress had intended anything else, the language would have been 'may at his election maintain in the state court an action at law.' "

See also

Nox v. United States Shipping Board Emergency Fleet Corporation, 193 N. Y. S. 340.

The subject was again considered by the District Court in

Lorang v. Alaska S. S. Co., et al., 298 Fed. 547,

where, in discussing this particular point, the court said:

> "* * * the provision *fixing jurisdiction in such actions in the court of the district* in which the defendant employer resides, or in which his principal place of business or office is located must be conclusively presumed to be the national District Court. Justice Van Devanter I think so held in The Allianca, supra. He said:
>
> > 'A reading of the provision (section 33) now before us with those sections (24 and 256) * * * makes it reasonably certain that the provision is not intended to affect the *general jurisdiction of the District Courts* as defined in section 24, but only to prescribe the venue for actions brought under the new act of which it is a part.' "

to which we add the following quotation from the decision of this court in

Panama Railroad Co. v. Johnson, supra.

> "* * * the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury,'—the import of which is that the injured seaman is permitted, but not required, *to proceed on the common-law side of the court* with a trial by jury as an incident. The words 'in such action', in the succeeding clause, are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues

> on the law side of the court, but not if he sues on the admiralty side. * * * In this view the statute leaves the injured seaman free under the general law—Sec. 24 (Par. 3) and 256 (Par. 3) of the Judicial Code—to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, *but, if he sues on the common-law side* there will be a right of trial by jury." (Italics ours.)

The language last quoted from the opinion of this Court in that case indicates quite clearly that the seaman relying on section 33 of the Merchant Marine Act of 1920 may sue only on the admiralty side or on the common law side of the District Court, and this was the view of the lower court, when it was considering the same point in the *Johnson v. Panama Railroad* case. In discussing the question, that court used this language:

> "The necessary effect of this is to permit a seaman who is a citizen of a state within the district aforesaid and of that district itself to sue, under the statute, in the federal court of the district in question."
>
> 277 Fed. 859.

Congress, it must be conceded, can, within constitutional limitations, give to a seaman additional rights and remedies. It has done so by enacting section 33 of the Merchant Marine Act of 1920. It also must be conceded that Congress can designate the court in which the right so given may be enforced. If, therefore, that section does designate the District Court of the United States, as the court in which rights under it may be enforced, it follows that that court only has jurisdiction of such cases.

Chaflin v. Houseman, supra.

The Superior Court of the State of California is, therefore, without jurisdiction of suits based upon section 33 of the Merchant Marine Act of 1920.

We submit, therefore, that the demurrer was properly sustained on any one of three grounds:

1. If the suit is not under the Jones Act, it is barred by the statute of limitations of the California Code.

2. Even if the Jones Act does apply to such a case as this, it is still barred by the state statute of limitations.

3. If it is brought under the Merchant Marine Act, the state court was without jurisdiction.

Respectfully submitted,

EDWARD J. MCCUTCHEN,
FARNHAM P. GRIFFITHS,
MCCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Respondent.

(APPENDIX FOLLOWS)

Appendix.

Appendix

CHAP. 149.—An Act relating to the liability of common carriers by railroad to their employees in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury

while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any

of its employees, such employees shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Sec. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled "An Act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

SUPREME COURT OF THE UNITED STATES.

No. 189.—October Term, 1925.

E. B. Engel, Petitioner, *vs.* J. O. Davenport et al. } On Writ of Certiorari to the Supreme Court of the State of California.

[April 12, 1926.]

Mr. Justice Sanford delivered the opinion of the Court.

The questions involved in this case relate to the effect of § 33 of the Merchant Marine Act of 1920, 41 Stat. 988, c. 250, which amended § 20 of the Seamen's Act of 1915, 38 Stat. 1164, c. 153, to read as follows: "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Engel, the petitioner, brought this action at law, in January, 1923, in a Superior Court of California, against the respondent Davenport, one of the owners of a vessel on which he had been employed as a seaman,[1] to recover damages for personal injuries

[1]Although other owners of the vessel were also named as defendants in the complaint, the record does not indicate that any of them were served with process or entered their appearance, the suit apparently having been prosecuted against Davenport alone.

suffered, in April, 1921, while he was engaged in placing a chain lashing around part of a cargo of lumber that had been taken on board the vessel at a port of landing. The complaint alleged, in substance, that the vessel had been negligently sent upon her voyage when unseaworthy and equipped with defective appliances, in that a pelican hook, which was a necessary part of the chain lashing used in carrying the cargo, had in it a flaw observable upon ordinary inspection; that this hook was not inspected; and that it broke by reason of this flaw, causing the injuries in question. Davenport demurred to the complaint, on the ground, *inter alia*, that the cause of action was barred by § 340, subd. 3, of the California Code of Civil Procedure, which required an action for personal injury caused by wrongful act or negligence to be commenced within one year. This demurrer was sustained, without leave to amend; and judgment was entered in favor of Davenport, which was affirmed, on appeal, by the Supreme Court of the State. 194 Cal. 344. This writ of certiorari was then granted. 266 U. S. 600.

The petitioner contends that the suit is one founded on § 33 of the Merchant Marine Act, of which the State courts have jurisdiction concurrently with the Federal courts; and that, by virtue of § 6 of the Employers Liability Act, 35 Stat. 65, c. 149, incorporated in the provisions of the Merchant Marine Act, it might be commenced within two years after the cause of action accrued, irrespective of the State statute.

The respondent contends, on the other hand, that the suit is not founded on the Merchant Marine Act and its provisions therefore have no application; and that, in any event, § 6 of the Employers Liability Act is not incorporated in the Merchant Marine Act and does not determine the period of time within which an action may be commenced in a state court.

It is settled by the decision in *Panama Railroad* v. *Johnson*, 264 U. S. 375, that § 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country-wide and uniform in operation; that it brings into the maritime law new rules drawn from the Employer's Liability Act and its amendments—adopted by the generic reference to "all statutes of the United States modifying or extend-

ing the common law right or remedy in cases of personal injuries to railway employees"—and "extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules"; that is, that it grants them, as an alternative, the common law remedy of an action "to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules," which, as a modification of the maritime law, may be enforced through appropriate proceedings *in personam* on the common-law side of the courts.

1. The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act, *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See *Western Fuel Co.* v. *Garcia*, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence, but also, under § 3 of the Employers Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. This conclusion is in harmony with the *Panama Railroad* case, pp. 382, 383, in which the complaint charged that the injuries resulted from negligence in providing a defective appliance and in other respects; and it is not in conflict with the *Carlisle Packing Co.* case, in which, as shown by the original record, the suit was commenced in 1918, prior to the Merchant Marine Act. And see *Lorang* v. *Steamship Co.* (D. C.), 298 Fed. 547, and *Lynott* v. *Transit Corporation*, 202 App. Div. 613.

2. It is clear that the State courts have jurisdiction concurrently with the Federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law. This

was assumed in *Re East River Co.*, 266 U. S. 355, 368; and expressly held in *Lynott* v. *Transit Corporation, supra,* affirmed, without opinion, in 234 N. Y. 626. And it has been implied in various decisions in the District Courts involving the question of the right to remove to a Federal court a suit that had been commenced in a State court.

By a provision of the Judiciary Act of 1789, now embodied in § 24, subd. 3, and § 256, subd. 3 of the Judicial Code, giving District Courts original jurisdiction of civil causes of admiralty and maritime jurisdiction, there is saved to suitors in all cases the right of a common law remedy where the common law is competent to give it. In *Chelentis* v. *Steamship Co.*, 247 U. S. 372, 384, where the suit had been commenced in a State court and removed to the Federal court, it was said that, under this saving clause, "a right sanctioned by the maritime law may be enforced through any appropriate proceeding recognized at common law." And the jurisdiction of the State courts to enforce the new common law right made a part of the maritime law, is necessarily affirmed by the provision contained in § 6 of the Employer's Liability Act[3]—plainly, we think, incorporated in the Merchant Marine Act by the generic reference—that jurisdiction of the Federal courts under the Act shall be concurrent with that of the courts of the several States, and no case arising thereunder when brought in any State court of competent jurisdiction shall be removed to any Federal court. Nor is the jurisdiction in suits under § 33 of the Merchant Marine Act limited to the Federal courts—as has been sometimes held in the District Courts—by its provision that jurisdiction "shall be under the court of the district" in which the employer resides or his principal office is located. This, as was held in the *Panama Railroad* case, p. 385, was not intended to affect the general jurisdiction of the Federal courts, but only to prescribe the venue of actions brought in them under the Act.

3. This brings us to the question whether a suit brought in a State court to enforce the right of action granted by the Merchant Marine Act may be commenced within two years after the cause of action accrues, or whether a State statute fixing a shorter period of limitation will apply. Section 6 of the Employer's Liability Act

[3]Inserted by the amendment of 1910, 36 Stat. 291, c. 143.

provides that "no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued," This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates. *Atlantic Coast Line* v. *Burnette*, 239 U. S. 199, 201. And it necessarily implies that the action may be maintained, as a substantive right, if commenced within the two years.

The adoption of an earlier statute by reference, makes it as much a part of the later act as though it had been incorporated at full length. *Kendall* v. *United States*, 12 Pet. 524, 625; *In re Heath*, 144 U. S. 92, 94; *Interstate Railway* v. *Massachusetts*, 207 U. S. 79, 85. It brings into the later act "all that is fairly covered by the reference," *Panama Railroad* case, p. 392; that is to say, all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act. It is clear that the provision of the Employer's Liability Act as to the time within which a suit may be instituted, is directly applicable to the subject-matter of the Merchant Marine Act and covered by the reference. In the *Panama Railroad* case, p. 392, it was held that the contention that the Merchant Marine Act did not possess the uniformity in operation essential to its validity as a modification of the maritime law, was unfounded, since the Employer's Liability Act which it adopted, had a uniform operation, which could not be deflected from "by local statutes or local views of common law rules." The period of time within which an action may be commenced is a material element in such uniformity of operation. And, plainly, Congress in incorporating the provisions of the Employer's Liability Act into the Merchant Marine Act did not intend to exclude a provision so material, and to permit the uniform operation of the Merchant Marine Act to be destroyed by the varying provisions of the State statutes of limitation.

We conclude that the provision of § 6 of the Employer's Liability Act relating to the time of commencing the action, is a material provision of the statutes "modifying or extending the common law right or remedy in cases of personal injuries to railway employees" which was adopted by and incorporated in the Merchant Marine Act. And, as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in

reference to the maritime law, it must control in an action brought in a State court under the Merchant Marine Act, regardless of any statute of limitations of the State. See *Arnson* v. *Murphy*, 109 U. S. 238, 243.

The judgment of the Supreme Court of California is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

A true copy.

Test:

Clerk, Supreme Court, U. S.